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No. 06-

IN THE

Supreme Court of the United States

QUICKEN LOANS INC.,

Petitioner,

v.

PRESTON DUFAUCHARD,

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

The Parity Act, 12 U.S.C. Section 3803(a)(3) and (c), states that, to prevent discrimination against *non*-federally chartered housing lenders, such lenders may make alternative mortgage transactions "notwithstanding any State constitution, law, or regulation" as long as they comply with federal regulations governing such transactions when made by *federally* chartered lenders. Does the Parity Act explicitly preempt all state laws, as to non-federally chartered lenders, that do not apply to federally chartered lenders, as the Seventh Circuit has held, or is the scope of Parity Act preemption limited in ways that are not included in the Act's text, as the Ninth Circuit held?

Section 501 of the Depository Institutions Deregulation and Monetary Control Act ("DIDMCA"), 12 U.S.C. Section 1735f-7a(a)(1), states that "[t]he provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest...which may be charged, taken, received, or reserved...shall not apply to" certain mortgages at issue in this case. Does DIDMCA preemption depend on whether the state law expressly limits the rate or amount of interest, as the federal agency that administers the statute has opined, or does it depend on the state law's effect and purpose, as the Ninth Circuit held?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner below was Quicken Loans Inc. ("Quicken Loans"). The Respondent below was Wayne Strumpfer, the Commissioner of the California Department of Corporations ("Commissioner").

CORPORATE DISCLOSURE STATEMENT

Petitioner Quicken Loans Inc. is a corporation. Rock Holdings Inc. is the direct parent company of Quicken Loans Inc. There is no publicly held corporation that owns 10% or more of the stock of Quicken Loans Inc. or Rock Holdings Inc.

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Quicken Loans prays that this Court issue a writ of *certiorari* to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit filed May 22, 2006.

OPINIONS BELOW

The May 22, 2006 Opinion of the United States Court of Appeals for the Ninth Circuit (Appendix ("App.") A at 1a) is reported at 449 F.3d 944, *sub nom. Quicken Loans, Inc. v. William P. Wood.* The orders of the U.S. District Court for the Eastern District of California dated May 8, 2003, July 2, 2003, and May 7, 2004, are unreported. The May 13, 2004 judgment of the U.S. District Court for the Eastern District of California is unreported.

JURISDICTION

The judgment of the court of appeals was first entered on May 22, 2006. Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc, which was denied on July 11, 2006. This timely petition for writ of *certiorari* followed. The Court has jurisdiction in this case pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, REGULATORY, AND STATUTORY PROVISIONS INVOLVED

This case involves the following, which are reproduced in the Appendix: the Supremacy Clause, U.S. Const. art. VI, cl. 2; 12 U.S.C. Section 3803; 12 U.S.C. Section 1735f-7a(a)(1); 12 C.F.R. Section 560.220; 12 C.F.R. Section 590.3; Cal. Civil Code Section 2948.5 (1985); and Cal. Fin. Code Section 50204(o) (2001).

STATEMENT OF THE CASE

I. Background

Quicken Loans sued California's Commissioner of Corporations,[1] in the United States District Court for the Eastern District of California, under 28 U.S.C. Sections 1331 (federal question) and 1343(a)(3) (deprivation of equal rights secured by act of Congress).

Quicken Loans sued, *inter alia*, to compel the Commissioner to recognize the preemption of California law on mortgage lending by Section 804 of the Alternative Mortgage Transaction Parity Act ("Parity Act"), 12 U.S.C.

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[1] Demetrios A. Boutris was Commissioner at the commencement of the suit. He was succeeded by William P. Wood, who was succeeded by Wayne Strumpfer. The incumbent is Preston DuFauchard.

Section 3803, and by Section 501 of the Depository Institutions Deregulation and Monetary Control Act ("DIDMCA"), 12 U.S.C. Section 1735f-7a.

II. The Parity Act

Congress enacted the Parity Act after finding that "increasingly volatile and dynamic changes in interest rates ha[d] seriously impared [*sic*] the ability of housing creditors to provide consumers with fixed-term, fixed-rate credit secured by interests in rea' property." 12 U.S.C. Section 3801(a). Congress noted that the federal Office of Thrift Supervision ("OTS") had "recognized the importance of alternative mortgage transactions and ha[d] adopted regulations authorizing federally chartered depository institutions to engage in alternative mortgage financing."[2] Id.

Because federally chartered lenders were thus enabled to engage in alternative mortgage transactions, but state-chartered lenders were not, Congress decided to enhance the availability of housing credit to consumers by addressing restrictions imposed by state law on the latter category of lenders. The Parity Act is intended "to eliminate the discriminatory impact that those [state] regulations have upon nonfederally chartered housing creditors." Id. Section 3801(b).

The Parity Act seeks to achieve this goal by authorizing nonfederally chartered housing creditors to "make, purchase, and enforce alternative mortgage transactions" when those transactions are made "in accordance with regulations issued by [OTS]." Id. Section 3803(a). In a section entitled "Preemption of State constitutions, laws, or regulations," the Parity Act provides

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[2] The Parity Act defines alternative mortgage transactions as including loans in which the interest rate may be adjusted. 12 U.S.C. Section 3802(1)(A).

that "[a]n alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation." Id. Section 3803(c).

Pursuant to Section 3803(c), OTS has promulgated a regulation providing that non-federally chartered housing creditors "may make an alternative mortgage transaction as defined at 12 U.S.C. 3802(1), by following the regulations identified in paragraph (b) of this section, notwithstanding any state constitution, law, or regulation." 12 C.F.R. Section 560.220.[3]

III. DIDMCA

In 1980, Congress passed DIDMCA "to ease the severity of the mortgage credit crunches...and to provide financial institutions, particularly those with large mortgage portfolios, with the ability to offer higher interest rates on savings deposits." S. Rep. No. 96-368, at 18 (1979), reprinted in 1980 U.S.C.C.A.N. 236, 254. "Without enhancing the ability of institutions to achieve market rates on both sides of their balance sheets, the stability and continued viability of our nation's financial system would not be assured. Thus, Federal preemption of State usury ceilings would not only promote national home financing objectives but would provide the resources with which savers could be paid more interest on their savings accounts." Id. at 19.

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[3] Prior to September 26, 2002, a previous version of the regulation provided that pursuant to 12 U.S.C. Section 3803 non-federally chartered housing creditors "may make alternative mortgage transactions as defined by that section and further defined and described by applicable regulations identified in this section, notwithstanding any state constitution, law, or regulation."

With that intent, Congress enacted section 501 of DIDMCA, stating:

> (a) Applicability to loan, mortgage, credit sale, or advance; applicability to deposit, account, or obligation
>
> (1) The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest...which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is-
>
> (A) secured by a first lien on residential real property....

12 U.S.C. Section 1735f-7a(a)(1).

Congress authorized the Federal Home Loan Bank Board ("FHLBB" or "OTS"[4]) to issue rules and regulations and to publish interpretations governing the implementation of Section 501. 12 U.S.C. Section 1735-7a(f). Pursuant to that authority, OTS promulgated a regulation providing that "[t]he provisions of the constitution or law of any state expressly limiting the rate or amount of interest...which may be charged, taken, received, or reserved shall not apply to any Federally-related loan...secured by a first lien on...Residential real property." 12 C.F.R. Section 590.3(a).

Pursuant to FHLBB's authority to publish

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[4] Congress transferred the FHLBB's functions to OTS in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. 12 U.S.C. Section 1462a. Opinions of the former FHLBB constitute valid and binding precedent for savings associations unless or until modified or revoked by the OTS. OTS Op. by Solomon (September 29, 1994), 1994 OTS LEXIS 37.

interpretations governing the implementation of Section 501, FHLBB's General Counsel issued an Opinion Letter stating that his Office concluded that OTS' regulation implementing DIDMCA, 12 C.F.R. Section 590.3, preempted a Maryland law that permitted a lender to charge interest at any effective rate of simple interest on the unpaid principal balance of a loan only if the lender "does not require payment of any interest in advance...." FHLBB Office of General Counsel Opinion Letter (Quillan, May 8, 1987), 1987 FHLBB LEXIS 165.

IV. Quicken Loans in California

Quicken Loans is a Michigan corporation that engages in residential mortgage lending throughout the United States. Quicken Loans is a "nonfederally chartered" institution within the meaning of the Parity Act. The California Residential Mortgage Lending Act, Cal. Fin. Code Sections 50002 *et seq.*, requires Quicken Loans to obtain a license from the Commissioner to make loans secured by real property located in California, which Quicken Loans has done.

In California, Quicken Loans has made loans both for "alternative mortgage transactions" within the meaning of the Parity Act and for first mortgages covered by DIDCMA. There is no dispute that Quicken Loans has made its alternative mortgage transactions pertinent to this Petition in compliance with federal regulations governing such transactions.

V. California's "Per Diem Statutes"

California's "Per Diem Statutes" on mortgage interest gave rise to this case. Until January 1, 2001, the Per Diem Statute, Civil Code Section 2948.5, provided in relevant part:

Interest on the principal obligation of a promissory

> note secured by a mortgage or deed of trust on real property improved with one-to-four residential dwelling units shall not commence to accrue prior to close of escrow....

From January 1, 2001 until January 1, 2004, the Per Diem Statute, recodified at Fin. Code Section 50204(o), provided in relevant part:

> A licensee may not...[r]equire a borrower to pay interest on the mortgage loan for a period in excess of one day prior to recording of the mortgage or deed of trust.

It is undisputed that the Per Diem Statutes did not apply to federally chartered lenders.

VI. The Commissioner's interpretation of the Per Diem Statutes results in borrowers having interest-free use of the loan proceeds

The Commissioner interprets the Per Diem Statutes as prohibiting nonfederally chartered lenders from charging interest until one day before the underlying mortgage or deed of trust has been stamped by the county recorder. This results in an interest-free loan from the time that the loan proceeds are disbursed to the borrower until the time that the county recorder stamps the mortgage. For example, on March 11, 2002, the Commissioner informed Quicken Loans of his determination that it had violated the Per Diem Statutes. The Commissioner ordered Quicken Loans to refund to its borrowers amounts ranging from $360.90 to $17,454.52 for interest paid during recording delays on five loans ranging from 10 to 219 days. The Commissioner did so even though there is no dispute that, during that entire time period, each borrower had full and complete use of the loan proceeds.

The Commissioner also ordered Quicken Loans to

conduct a review of its entire California loan portfolio since October 14, 1999 for the purpose of determining the amounts of refunds allegedly owed to other borrowers. Finally, the Commissioner sought to revoke Quicken Loans' license because of the purported violations of law.

VII. Proceedings Below

The District Court entered summary judgment in favor of the Commissioner on Quicken Loans' Parity Act claim. The District Court entered summary judgment in favor of Quicken Loans on its DIDMCA claim.

The Ninth Circuit affirmed the judgment against Quicken Loans on the Parity Act claim. The Court held that California's prohibition on charging interest on an alternative mortgage transaction more than one day before being recorded, even though it did not apply to federally chartered lenders, was not preempted by the Parity Act.

The Ninth Circuit vacated the District Court's judgment in favor of Quicken Loans on the DIDMCA claim. The Ninth Circuit panel held that it was bound by an August 12, 2005, opinion filed by a different three-judge panel (after briefing in this case was completed), Wells Fargo Bank N.A. v. Boutris, 419 F.3d 949 (9th Cir. 2005). That panel held that DIDMCA did not preempt the Per Diem Statutes. The Wells Fargo panel based its decision on the purported effect and purpose of the Per Diem Statutes, rather than on their express language. The Wells Fargo panel also refused to defer to OTS' interpretation of the preemptive scope of its regulation implementing DIDMCA.

Quicken Loans sought panel rehearing and rehearing *en banc*, which was denied.

REASONS FOR GRANTING THE PETITION

I. There is a split between the Ninth and Seventh Circuits on the scope of Parity Act preemption.

The Parity Act enables nonfederally chartered lenders to make alternative mortgage transactions "notwithstanding any State constitution, law or regulation." Parity Act, 12 U.S.C. Section 3803(c). The Seventh Circuit held that this language means what it says. "Section 3803(c) is as express as a preemption clause gets." Ill. Ass'n of Mortg. Brokers v. Office of Banks and Real Estate, 308 F.3d 762, 766 (7th Cir. 2002) ("IAMB"). "[W]e hold that the [challenged] state regulations are preempted under § 3803(c) to the extent that they block state lenders from extending credit on terms open under federal regulations, when the lenders actually comply with the federal regulations." Id. at 768.

However, the Ninth Circuit refused to give effect to the Parity Act's plain meaning. Instead, the Court created a three-part test that is nowhere to be found in the Parity Act's text. The Court said that the Per Diem Statutes were not preempted because (1) they "do not apply exclusively to alternative mortgages, but rather are statutes of general applicability"; (2) they "do not touch upon the areas identified by the OTS as essential and intrinsic to the ability to engage in alternative mortgage transactions"; and (3) they "do not restrict a housing creditor's ability to make an alternative mortgage transaction, any more than does any statute which applies to nonfederally chartered housing creditors but not to federally chartered housing creditors."[5]

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[5] The Fourth Circuit's interpretation of the Parity Act is close to the Seventh Circuit's and leads to the same result, i.e. parity between federally and nonfederally chartered lenders. The Fourth Circuit's interpretation is very far from the Ninth Circuit's extra-textual three-part test. Under the Fourth Circuit's interpretation, Parity Act preemption of state law is

Further, this Circuit split is unlikely to be resolved other than by this Court. Congress is not considering amending the Parity Act in a manner that would resolve the split or make it moot. This Court should grant *certiorari* to resolve this split in the circuits on this important question of federal preemption. Buckman v. Plaintiffs' Legal Committee, 531 U.S. 341, 347, (2001) (granting *certiorari* to resolve circuit split on preemptive scope of federal statute); Int'l Paper Co. v. Ouellette, 479 U.S. 481, 487 (1987) (same).

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as broad as the preemption provided by every federal regulation that is "part of [the agencies'] regulations for alternative mortgage transactions." Nat'l Home Equity Mortg. Ass'n v. Face, 239 F.3d 633, 638 (4th Cir. 2001) ("NHEMA"). Thus, in NHEMA, the Fourth Circuit held that the Parity Act preempts a Virginia restriction on prepayment penalties as applied to alternative mortgage transactions made by state chartered lenders in compliance with federal regulations governing such transactions. The court reasoned that, as part of OTS' regulations for alternative mortgage transactions, OTS promulgated 12 C.F.R. Section 560.34, which permits federally chartered thrifts to charge prepayment penalties on such transactions. Under the Fourth Circuit's interpretation, the Parity Act preempts the Per Diem Statutes, because the OTS regulation that preempts the Per Diem Statutes as to federal lenders, 12 C.F.R. Section 560.2(b)(4), lists as examples of state laws that are preempted any laws imposing requirements on adjustments to the interest rate. As noted, the Parity Act defines alternative mortgage transactions as including loans in which the interest rate may be adjusted. 12 U.S.C. Section 3802(1)(A).

II. The Ninth Circuit's decision is an egregious departure from this Court's teachings on statutory interpretation.

A. The Ninth Circuit created disparity instead of parity in interpreting the Parity Act.

When a statute's text has a clear meaning, its clear meaning controls. Cooper Industries v. Aviall Services, 543 U.S. 157, 167-68 (2004); Sprietsma v. Marine, 537 U.S. 51, 62-63 (2002) ("Because the FBSA contains an express pre-emption clause, our task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent"). The Parity Act's clear meaning is that, when a state lender complies with federal regulations governing alternative mortgage transactions made by federally-chartered lenders, then the state lender may make such transactions "notwithstanding any State constitution, law, or regulation." That is, state lenders are free to make alternative mortgage transactions on the same terms as federal lenders. IAMB, 308 F.3d at 768.

The Parity Act, in short, creates parity between federally and nonfederally chartered lenders by preempting state laws that would apply unequally. The Ninth Circuit's decision creates disparity by declining to apply preemption.

Instead of applying the clear meaning, the Ninth Circuit created a test that is essentially an exercise in legislative policy-making. What is more, none of the reasons that the Ninth Circuit offered for its extra-textual creation is persuasive. First, it relied on its own decision in Ansley v. Ameriquest Mortg. Co., 340 F.3d 858, 864 (9th Cir. 2003). However, Ansley involved the narrow question whether the Parity Act so completely preempts state law as to confer removal jurisdiction over a complaint pleading only state law claims. Id. at 861-62.

Second, the court cited a case from the D.C. Circuit and from a California Court of Appeal,[6] but did not explain why those cases justify deviation from the Parity Act's plain meaning. Third, the court noted that state licensing requirements may apply under 12 U.S.C. Section 3802(2). However, licensing requirements cannot restrict state lenders from making alternative mortgage transactions on terms available to federal lenders. IAMB, 308 F.3d at 767 ("Smuggling the regulation of terms into the criteria for issuing licenses, and then arguing that state-chartered lenders lose all benefits of the 1982 Act, would be...ineffective as a matter of federal law").

Fourth, the court reasoned that "the Parity Act's language does not explicitly preempt state statutes which regulate the commencement of interest..." While this is true as far as it goes, it is irrelevant. The Parity Act does not limit its preemptive effect to particular types of laws.

This Court should grant *certiorari* to correct the Ninth Circuit's failure to comply with the settled rules of statutory interpretation.

B. The Ninth Circuit disregarded the plain language of DIDMCA, which states that a state law "expressly limiting the rate or amount of interest" on mortgages "shall not apply."

The Ninth Circuit made a similar error of interpretation regarding DIDMCA. DIDMCA's text is plain and unambiguous. 12 U.S.C. Section 1735f-7a(a)(1) states that "[t]he provisions of the constitution or the laws of any State expressly limiting the rate or amount of

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[6] Nat'l Home Equity Mortg. Ass'n v. Office of Thrift Supervision, 373 F.3d 1355 (D.C. Cir. 2004) and Black v. Fin. Freedom Senior Funding Corp., 92 Cal.App.4th 917, 112 Cal.Rptr.2d 445 (2001).

interest...which may be charged, taken, received, or reserved...shall not apply to" certain loans at issue. As the Ninth Circuit (and First Circuit) have correctly recognized, to determine whether DIDMCA preempts a particular state law, courts must "focus on whether the express language of the state statute limits the rate or amount of interest which the lender may charge, not on broad-gauged assessments concerning the likely impact the state ban...would have on home-mortgage lenders..." Wells Fargo, 419 F.3d at 969 (quoting Grunbeck v. Dime Savings Bank of New York, FSB, 74 F.3d 331, 337-38 (1st Cir. 1996)) (brackets, quotation marks, and emphases omitted).

Until 2001, the Per Diem Statute provided that interest "shall not commence to accrue prior to close of escrow or...the date upon which the loan proceeds have been made available for withdrawal as a matter of right." Cal. Civil Code Section 2948.5. From 2001 to 2004, the Per Diem Statute provided that a lender "may not...[r]equire a borrower to pay interest on the mortgage loan for a period in excess of one day prior to recording of the mortgage or deed of trust." Cal. Fin. Code Section 50204(o). As noted, the Commissioner interprets both statutes as prohibiting interest until one day before the mortgage is stamped by the county recorder.

The Per Diem Statutes' texts expressly limited to zero the *amount* of interest that lenders may charge prior to one day before recordation (as interpreted by the Commissioner). Indeed, this means that the borrowers would receive an interest-free loan between the date that the loan is disbursed and the date that the mortgage is stamped by the county recorder. For this reason alone, the Per Diem Statutes are preempted by DIDMCA.

In addition, the Per Diem Statutes' texts expressly limited to zero percent per day the *rate* of interest that may be charged prior to one day before recordation (again, as

interpreted by the Commissioner). Again, this would result in an interest-free loan from the date the loan is disbursed until the date that the mortgage is stamped by the recorder. For this independent and sufficient reason, DIDMCA preempts the Per Diem Statutes.

However, when the Ninth Circuit addressed whether DIDMCA preempts the Per Diem Statutes, the court violated its own command when it impermissibly focused on the anticipated effect the Per Diem Statutes would have, rather than the text. 419 F.3d at 959 (Per Diem Statutes not preempted because "[b]anks were free to alter the post-recordation rate of interest to account for any pre-recordation no-interest period"); id. (no DIDMCA preemption "where 'rates' and 'amounts' of interest remain fully adjustable so that banks can obtain the same return that they would have otherwise"); id. (noting that "there may well be practical reasons why banks will not adjust their rates or amounts of interest to account for the state restriction"); id. (no preemption because "as long as recordation was completed, any amount of interest could be charged").

The Ninth Circuit also deviated from the plain meaning of DIDMCA's text when it substituted the alleged "purpose" behind the Per Diem Statutes for the text. The Court speculated that "the evident purpose of the statute, albeit imperfectly addressed, is to protect consumers by providing an incentive for completion of tasks necessary to perfect the purchase, not to limit the rate or amount of interest paid." Id. at 969. Because DIDMCA preempts state statutes whose *text* expressly limits the rate or amount of interest, the unexpressed "purpose" of the state statute is irrelevant.

The Ninth Circuit's analysis was further flawed because it added language to DIDMCA's clear command. The Ninth Circuit said the Per Diem Statutes did not expressly limit the *amount* of interest because they did not

expressly restrict "the total amount of interest that may be charged ***over the life of the loan***." Id. at 968-69 (emphasis added). But the emphasized language is not found anywhere in DIDMCA—it is simply the Ninth Circuit's creation. Similarly, the Ninth Circuit held that the Per Diem Statutes did not expressly restrict the *rate* of interest that may be charged because they did not restrict "the rate that may be charged ***when interest is in effect***." Id. at 968-69 (emphasis added); see also id. at 969 (Per Diem Statutes did not address "the rate of interest permissible ***for a period during which some interest is payable***") (emphasis added). Again, the emphasized language is simply the Ninth Circuit's invention, found nowhere in DIDMCA's text.

The Ninth Circuit failed to give effect to DIDMCA's plain meaning, in violation of Congress' intent and the settled law of statutory interpretation.

III. The Ninth Circuit abandoned the doctrine of administrative deference when it failed to defer to OTS' reasonable interpretation of DIDMCA preemption because it was "unpersuasive."

The Ninth Circuit also refused to defer to OTS's opinion letter that reasonably interpreted the preemptive scope of its own regulation implementing DIDMCA. To the extent that the regulation is ambiguous, OTS' interpretation of its regulation is "controlling unless plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997); Christensen v. Harris County, 529 U.S. 576, 586-88 (2000); In re Wal-Mart Stores, 395 F.3d 1177, 1184-85 (10th Cir. 2005) (Department of Labor opinion letters are entitled to Auer deference when they interpret the Department's own regulations).

Pursuant to statutory authority, FHLBB's General Counsel issued an Opinion Letter concluding that 12 C.F.R. Section 590.3 preempted a Maryland law that permitted a lender to charge interest at any effective rate of simple

interest on the unpaid principal balance of a loan only if the lender "does not require payment of any interest in advance...." FHLBB Office of General Counsel Opinion Letter, *supra*. FHLBB's General Counsel reasonably (and correctly) concluded that the prohibition expressly limited the amount of interest that lenders may charge, and so was preempted.

California's Per Diem Statutes, like the Maryland statute at issue in FHLBB's Opinion Letter, also prohibited lenders from charging interest in advance of a certain date—here, one day prior to recordation of the underlying deed of trust. The Ninth Circuit's holding that DIDMCA does not preempt the Per Diem Statutes contradicts OTS' interpretation of the preemptive scope of its implementing regulation.

The Ninth Circuit did not deny that its holding contradicts OTS' opinion letter. Instead, the Ninth Circuit explained its refusal to defer to OTS' opinion letter solely in the following cryptic footnote:

> For reasons identified by Grunbeck, [Quicken Loans'] argument that we should defer to the interpretation of the federal Office of Thrift Supervision is deficient. See Grunbeck, 74 F.3d at 336 ("Where Congress has spoken directly to the issue, an interpretation rendered by the agency responsible for administering the statute is entitled to no special deference." (citing Chevron USA v. Natural Resources Defense Council, 467 U.S. at 842, 104 S.Ct. 2778)).

Wells Fargo, 419 F.3d at 969 n.27. Although Grunbeck did cite the above language from Chevron, Grunbeck explained that it refused to defer to OTS opinion letters at issue there because it disagreed with them. The First Circuit reasoned that, "[a]s deference ultimately depends on the persuasiveness of the agency's position, we agree [with the

district court] that none is due in this instance." Grunbeck, 74 F.3d at 342 (citation omitted). It continued, "[t]he interpretation adopted by these agencies disregarded entirely the term 'expressly'—which plainly constrains the scope of the section 501(a)(1) preemption clause—and overlooked the relevant legislative history explicitly declaring a congressional intention to preempt state usury-law ceilings—as distinguished from bans on compounding—which result in artificial disruptions in home-mortgage loan credit by mandating below-market interest rates." Id. Further, according to the court, "there is no explicit indication that either agency considered the significant consumer protections afforded by state bans...against charging interest on interest." Id. (citation omitted). The court concluded that "the agency interpretation...is unpersuasive and entitled to no deference in the present context." Id.

The First Circuit and the Ninth Circuit (by extension) erred in refusing to defer to OTS' opinion letters because of disagreement with them. Deference is not merely a question of whether the agency's interpretation is persuasive to the Court. If a Court is persuaded, it need not defer, because it has come to the same conclusion. Deference to an agency's interpretation of its own regulation means that interpretation is "controlling unless plainly erroneous or inconsistent with the regulation." See Auer, 519 U.S. at 461. This Court should grant *certiorari* to redress the Ninth Circuit's failure to accord Auer deference to OTS' interpretation of 12 C.F.R. Section 590.3.[7]

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[7] The U.S. Office of the Comptroller of the Currency ("OCC") OCC is charged with the supervision and regulation of national banking associations. First Nat'l Bank of Lamarque v. Smith, 610 F.2d 1258, 1264 (5th Cir. 1980); NationsBank of North Carolina, N.A. v. Variable Life Ins. Co., 513 U.S. 251, 254, 257 (1995); 12 U.S.C. Section 1 *et seq*. In an a*micus curiae* brief at the District Court level in a case related to this one, OCC expressed its opinion that

IV. This Petition presents important issues that are complementary to issues on preemption pending before this Court.

The important issues that this Petition presents are complementary to others pending before this Court. On June 19, 2006, this Court granted *certiorari* in Watters v. Wachovia Bank, N.A., 126 S. Ct. 2900 (2006) (No. 05-1342). In Watters, the Sixth Circuit held that the National Bank Act and an OCC implementing regulation preempt the application of Michigan's Mortgage Brokers, Lenders, and Servicers Licensing Act and the Secondary Mortgage Act to Wachovia Mortgage Corp.'s mortgage lending activities in that state. The ground of preemption is that Wachovia Mortgage Corp. is an operating subsidiary company of a

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California's Per Diem Statutes "specifically limit the amount of interest that a national bank may charge by preventing national banks from collecting interest on their loans for a period of time after the funds have been made available to the borrower." "As applied, this restriction conflicts with the federal authorization for national banks to charge interest without regard to such state law limitations," and [a]ccordingly, it is preempted."

The Ninth Circuit's treatment of the Per Diem Statutes squarely contradicts OCC's interpretation of DIDMCA. Whereas the Ninth Circuit incorrectly thought that DIDMCA permitted it to focus on the Per Diem Statutes' purported effect and purpose, OCC understands and has clearly articulated that DIDMCA preemption is directly tied to the state law's text. More importantly, the Ninth Circuit's erroneous interpretation led it to find no preemption, whereas OCC concludes that the Per Diem Statutes are preempted. This contradiction of yet another federal agency's interpretation of DIDMCA is an additional reason to grant *certiorari* on this important issue.

federally-chartered bank.

In Watters, there was no circuit split on the scope of National Bank Act preemption; every court to have addressed the issue reached the same result as the Sixth Circuit. See Wells Fargo, 419 F.3d at 962-63; Wachovia Bank v. Burke, 414 F.3d 305 (2nd Cir. 2005); Nat'l City Bank v. Turnbaugh, 367 F. Supp.2d 805 (D. Md. 2005). However, this Court granted *certiorari* on the issue whether the OCC's interpretation that 12 C.F.R. Section 7.4006 preempts Michigan's laws regulating mortgage lending as applied to state chartered nonbank operating subsidiaries is entitled to Chevron deference.

Here, as in Watters, the issue is the scope of federal preemption of state law regulating mortgage activity by a non-federally chartered lender. More specifically, complementary to Watters, an issue regarding DIDMCA is whether OTS' interpretation of the preemptive scope of 12 C.F.R. Section 590.3 and 12 U.S.C. Section 1735f-7a(a)(1) is entitled to deference.

Further, regarding Parity Act preemption, this Petition is based on a circuit split that is even more central to this Petition than the split in Watters was to that Petition. In Watters, the Tenth Circuit opinion that gave rise to the *certiorari*-worthy split did not involve banking regulation, but instead resolved whether the federal Hazardous Materials Transportation Uniform Safety Act of 1990 and its implementing regulations preempted the Colorado Nuclear Materials Transportation Act of 1986. Colorado Public Utilities Comm'n v. Harmon, 951 F.2d 1571, 1574 (10th Cir. 1991). Here, the split between the Ninth and Seventh Circuits is on the scope of Parity Act preemption, the precise issue that this Petition raises.

Because this Petition raises issues that are complementary to those in Watters, including a circuit split

that is even more central to the petition than that in Watters, this Court should grant *certiorari* to resolve these important issues of federal preemption.

V. The Ninth Circuit's decision eviscerates federal preemption of state laws in a field of financial activity that is vital both to the nation's economic prosperity and to consumers.

Mortgage financing is an important sector of the American economy. During the years 2001-2005, consumers originated loans secured by one-to-four family houses totaling over $14.5 trillion. During the year 2003 alone, consumers originated over $3.8 trillion in loans on such properties.
http://www.mbaa.org/ResearchandForecasts/MarketEnvironment/1-4FamilyMortgageOriginations1990-2005.htm.

Mortgage refinancing in particular is a very important economic sector. In 2003, for example, consumers originated over $2.5 trillion in refinance loans on such properties. Id. In 2002, consumers refinanced 10 million home mortgages, excluding home equity and construction loans, in the amount of $1.75 trillion. Mortgage originations in the same year were valued at $2.5 trillion. Refinancing of mortgages allowed households in 2002 to cash out $200 billion in home equity, $70 billion of which was used to pay down debt. It is estimated that half the billions cashed out were used for home improvements and other purchases that helped bolster the economy. See Speech of Federal Reserve Board Chairman Alan Greenspan at the convention of the Independent Community Bankers of America, Orlando, Florida, March 4, 2003.

Congress has recognized the national importance of this economic sector and taken steps to foster its growth. The Parity Act and DIDMCA are but two of those steps. However, Congress's ability to foster economic growth depends in great measure on its power to preempt state laws

that are at odds with national objectives. Again, the Parity Act and DIDMCA are two unambiguous examples of Congress's exercise of its power under the Supremacy Clause of the Constitution. The former creates a level playing field for federally and non-federally chartered lenders to make alternative mortgage transactions "notwithstanding any State constitution, law, or regulation." The latter commands that state laws expressly limiting the rate or amount of mortgage interest "shall not apply."

When Congress speaks so plainly, there can be only one system of regulation. Permitting the breakdown of preemption in this case will invite other states to create parochial hurdles that will disintegrate what should be an unimpeded national marketplace in mortgage financing. The impact will not be limited to the Ninth Circuit. States outside of that circuit have found attraction in parochial regulation of mortgage financing. See, e.g., U.S. Bank Nat'l Ass'n v. Clark, 216 Ill.2d 334, 837 N.E.2d 74 (Ill. 2005) (DIDMCA preempts Illinois Interest Act); Mayor of the City of New York v. Council of the City of New York, 4 Misc.3d 151, 780 N.Y.S.2d 266 (2004) (DIDMCA preempts city ordinance that prohibits mortgage creditors from charging higher rates than those it authorizes as condition of eligibility to do business with city); Shelton v. Mutual Savings and Loan, 738 F. Supp. 1050 (E.D. Mich. 1990) (DIDMCA preempts Michigan law providing that mortgages "shall not provide for a rate of interest added or deducted in advance, and interest on the mortgage loan or land contract shall be computed from time to time only on the basis of unpaid balances").

The Ninth Circuit's decision, if it stands, will be an enticement to state regulators. In such an important field of national financial activity, this Court should resolve these issues now, rather than wait for further balkanization of the marketplace before acting to reassert federal preemption.

CONCLUSION

For the foregoing reasons, the Petition should be granted, and the decision below summarily reversed, or the case should be set for plenary briefing and argument on the important questions presented.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 04-16244, 04-16312

QUICKEN LOANS, INC., a Michigan corporation,
Plaintiff-Appellant,

v.

WILLIAM P. WOOD, in his official capacity as Commissioner of the California Department of Corporations,
Defendant-Appellee.

QUICKEN LOANS, INC., a Michigan corporation,
Plaintiff-Appellee,

v.

WILLIAM P. WOOD, in his official capacity as Commissioner of the California Department of Corporations,
Defendant-Appellant.

Argued and Submitted March 14, 2006
Filed May 22, 2006

Before ALFRED T. GOODWIN, STEPHEN REINHARDT, and MICHAEL DALY HAWKINS, *Circuit Judges*.

GOODWIN, *Circuit Judge*.

These cross-appeals involve the California Department of Corporations Commissioner's (Commissioner) efforts to enforce previous versions of California's per diem loan interest statutes. The district court held that these laws were pre-

empted by the Depository Institutions Deregulation and Monetary Control Act (DIDMCA), 12 U.S.C. § 1735f-7a, but denied a permanent injunction to prevent the Commissioner from enforcing the preempted statutes.

Wells Fargo Bank N.A. v. Boutris, 419 F.3d 949 (9th Cir.2005), held, after the district court had ruled in this case, that California's per diem statutes are not preempted by the DIDMCA. *Wells Fargo* controls here. The district court also held that the Alternative Mortgage Transaction Parity Act (Parity Act), 12 U.S.C. §§ 3801-06, does not preempt the per diem statutes as applied to alternative mortgage transactions. We affirm this conclusion because California's per diem statutes are not expressly preempted, do not directly conflict with, and do not impede Congress' purposes in enacting the Parity Act. The per diem statutes therefore are not preempted by the Parity Act. Finally, we affirm the district court's dismissal of Quicken Loans' as-applied federal takings claim for lack of ripeness, and hold that any facial claim was waived.

I. Background

Quicken Loans (Quicken) is licensed to engage in residential mortgage lending in California by the California Department of Corporations Commissioner. *See* Cal. Fin. Code §§ 50000 *et seq.*

Quicken describes its loan process as follows:

> After Quicken Loans approves a loan, Quicken Loans and its California borrowers typically complete the lending process through independent escrow companies. . . . Quicken Loans deposits the funds for the loan into the escrow. The borrower delivers the executed loan documents to the escrow company. . . .
>
> When the conditions required to close the transaction have been satisfied, the escrow company is instructed by

> Quicken Loans to disburse the funds to or on behalf of the borrower, and to deliver the deed of trust to the County Recorder's office for recordation in the public records. . . .
>
> . . . .
>
> Quicken Loans historically has instructed the escrow company to assess interest commencing on the date the escrow company disburses the loan funds directly to the borrower, or to a third party on the borrower's behalf.

Quicken admits that "there are occasional delays between (a) the disbursement of loan funds to the borrower and (b) 'recordation' of the deed of trust as interpreted by the Commissioner." During these delays Quicken assesses interest on the disbursed loans.

Because Quicken is licensed under the California Residential Mortgage Lending Act, the Act's prohibition on charging interest in excess of one day prior to recordation applies to Quicken. Cal. Fin. Code § 50204(o) (2000) (amended 2003 to prohibit violating a similar provision located at Cal. Civ. Code § 2948.5). In addition, California Civil Code section 2948.5 provides that a borrower is not required to pay interest for a period in excess of one day prior to recording. Cal. Civ. Code § 2948.5 (1990) (amended 2003 to prohibit interest payments more than one day prior to disbursement instead of one day prior to recordation). Although the statutes were amended to prohibit interest payments more than one day prior to disbursement, these amendments did not become effective until after Quicken had received interest payments in violation of the earlier applicable laws. All references to these statutes refer to the prior versions of the statutes unless otherwise specified.

On March 11, 2002, the Commissioner sent Quicken a letter asserting that Quicken had violated and was continuing to violate these pre-amendment statutes. On January 28, 2003,

the Commissioner ordered Quicken to review all loans it had made in California beginning October 14, 1999, and to refund those interest payments received which violated the per diem statutes. He also ordered Quicken to pay the borrowers 10% interest on the refunded interest, and to submit a report detailing the loans and amounts refunded. The Commissioner sought to revoke Quicken's license for failure to comply with California law. Quicken's First Amended Complaint alleged that the DIDMCA and the Parity Act preempt the per diem statutes, and that the per diem statutes effected an unlawful taking in violation of the Constitution's Takings Clause. Quicken and the Commissioner cross-moved for summary judgment.

The district court granted Quicken's motion for partial summary judgment on the DIDMCA claim, dismissed Quicken's takings claim for lack of ripeness, and granted the Commissioner's motion for summary judgment on the Parity Act claim.

Quicken assigns error to the resolutions of the Parity Act and Takings Clause claims, and to the denial of a permanent injunction barring enforcement of the per diem statutes to the extent they are preempted by the DIDMCA. The Commissioner cross-appeals, assigning error to the resolution of the DIDMCA claim.

II. DIDMCA

Wells Fargo held that California's per diem statutes are not preempted by the DIDMCA. 419 F.3d at 969. Quicken attempts to argue that *Wells Fargo* should not be followed because it was decided by a three-judge panel rather than by the court sitting en banc, and that *Wells Fargo's* DIDMCA discussion is dicta. In general, "one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel." *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992). Furthermore, the *Wells Fargo* DIDMCA discussion

begins with the statement that "we must decide this substantive preemption issue." *Wells Fargo Bank N.A.*, 419 F.3d at 967. So much for "dicta," and Quicken cannot distinguish *Wells Fargo*. Accordingly, the DIDMCA does not preempt the California per diem statutes here. As Quicken does not prevail on the merits, an injunction is not available. *See Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

III. Parity Act

Congress enacted the Parity Act after finding that "increasingly volatile and dynamic changes in interest rates ha[d] seriously impared [sic] the ability of housing creditors to provide consumers with fixed-term, fixed-rate credit secured by interests in real property." 12 U.S.C. § 3801(a). Congress noted that the Office of Thrift Supervision (OTS), among other agencies, had "recognized the importance of alternative mortgage transactions and ha[d] adopted regulations authorizing federally chartered depository institutions to engage in alternative mortgage financing." *Id.* Congress enacted the Parity Act "to eliminate the discriminatory impact that those regulations have upon nonfederally chartered housing creditors." *Id.* § 3801(b). The Parity Act authorizes nonfederally chartered housing creditors to "make, purchase, and enforce alternative mortgage transactions" when those transactions are made "in accordance with regulations governing alternative mortgage transactions as issued by the Director of the Office of Thrift Supervision." *Id.* § 3803(a). In a section entitled "Preemption of State constitutions, laws, or regulations," the Parity Act provides that "[a]n alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation." *Id.* § 3803(c).

Quicken asserts that the district court erred in holding that the Parity Act does not preempt the California per diem statutes as applied to alternative mortgage transactions. Quicken

makes two arguments: (1) the per diem statutes are preempted because they conflict with an OTS regulation on adjustments and (2) the per diem statutes are expressly preempted because they destroy parity between federally and non-federally chartered lenders.

The Supremacy Clause provides that federal laws "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. ART. VI, cl. 2. Preemption analysis must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). "The purpose of Congress is the ultimate touchstone of preemption analysis." *Cipollone v. Liggett Group*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (internal quotation marks omitted). State law is preempted if Congress' intent to preempt is (1) explicit in the federal statute's language or (2) implicit in its structure and purpose; (3) if state law actually conflicts with federal law; or (4) if federal law so thoroughly occupies the legislative field that Congress left no room for state regulation. *Id.* Conflict preemption exists "where 'compliance with both federal and state regulations is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963); and *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). Quicken's arguments implicate both express and conflict preemption.

A. Conflict with 12 C.F.R. § 560.35

The Parity Act authorized the OTS to identify, describe, and publish those regulations that are inappropriate and inapplicable to nonfederally chartered housing creditors. 12 U.S.C. § 3801 note. The OTS identified 12 C.F.R. § 560.35 as "appropriate and applicable for state housing creditors." 12 C.F.R. § 560.220(b). This regulation provides that adjustments to the payment amount for a home loan must comply with the following limitations:

> Adjustments to the payment and the loan balance that do not reflect an interest rate adjustment may be made if:
>
> (1) The adjustments reflect a change in an index that may be used pursuant to paragraph (d) of this section;
>
> (2) In the case of a payment adjustment, the adjustment reflects a change in the loan balance or is made pursuant to a formula, or to a schedule specifying the percentage or dollar change in the payment as set forth in the loan contract; or
>
> (3) In the case of an open-end line-of-credit loan, the adjustment reflects an advance taken by the borrower under the line-of-credit and is permitted by the loan contract.

12 C.F.R. § 560.35(c).

Quicken contends that the per diem statutes' prohibition on collecting interest more than one day prior to recording conflicts with § 560.35. The conflict, it argues, arises because when recording occurs more than one day after disbursement, the per diem statutes "require adjustments in the payment amount based upon a factor not permitted by the regulation: the arbitrary date of late recording." This amounts to a conflict argument invoking physical impossibility. The Commissioner contends that the regulation "does not appear in any way intended to address (or preempt) state statutes governing commencement of interest." Likewise, the district

court held that had Quicken complied with the per diem statutes in the first place, no adjustments would be necessary.

Despite Quicken's argument, there is no actual conflict between the California per diem statutes and the OTS regulation on adjustments. It is not physically impossible to charge no interest for more than one day before recording and to adjust payments only in accordance with the OTS regulation's requirements. Because commencement of interest is not a form of interest adjustment, summary judgment for the Commissioner was appropriate.

Although Quicken also contends that the Commissioner failed to meet his burden to show that there was no genuine issue of material fact regarding the Parity Act, this argument is again based on Quicken's conflation of a payment adjustment with commencement of interest. This is a legal rather than factual argument. The Commissioner satisfied his burden to show there was no genuine issue of material fact.

B. Express Preemption

Quicken also argues that the Parity Act explicitly preempts the per diem statutes. Quicken invokes 12 U.S.C. §§ 3801(b) and 3803(c) to support this argument. Section 3801(b) states the purpose of the Parity Act:

> It is the purpose of this chapter to eliminate the discriminatory impact that those regulations [authorizing federally chartered depository institutions to engage in alternative mortgage financing] have upon nonfederally chartered housing creditors and provide them with parity with federally chartered institutions by authorizing all housing creditors to make, purchase, and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by the Federal agencies.

12 U.S.C. § 3801(b). Section 3803(c) is entitled "Preemption of State constitutions, laws or regulations," and provides that

"[a]n alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation."

Quicken contends that because the per diem statutes do not apply to federally chartered housing creditors, the Parity Act expressly preempts them because "such preemption is necessary to achieve parity." The Parity Act's preemption clause does not preempt every state law regulating alternative mortgage transactions (AMTs), nor does the Act contain language mandating that federally and nonfederally chartered housing creditors must be treated identically in every respect under state law. *See, e.g., Ansley v. Ameriquest Mortgage Co.*, 340 F.3d 858, 864 (9th Cir.2003) ("[T]he Parity Act d[oes] not completely preempt all California laws relating to alternative *951 mortgage transactions so as to create federal jurisdiction."); *Nat'l Home Equity Mortgage Ass'n v. Office of Thrift Supervision*, 373 F.3d 1355, 1359 (D.C.Cir.2004) ("[T]he Parity Act does not unambiguously express an intent to preempt all state laws governing AMTs."); *Black v. Fin. Freedom Senior Funding Corp.*, 92 Cal.App.4th 917, 112 Cal.Rptr.2d 445, 456 (2001) ("[T]he preemption language of the Parity Act does not contain a clear manifestation of congressional intent to preempt all state laws concerning the terms and marketing of alternative mortgage transactions."); 12 U.S.C. § 3802(2) (requiring housing creditors to be "licensed under applicable State law" and "subject to the applicable regulatory requirements and enforcement mechanisms provided by State law"). Because the Parity Act's language does not explicitly preempt state statutes which regulate the commencement of interest, Quicken's express preemption argument fails.

C. Extent of Congressional Intent to Preempt

Quicken's claim, despite its identification as an express preemption argument, is better construed as an argument that the per diem statutes "'stand[ ] as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress.'" *Gade*, 505 U.S. at 98, 112 S.Ct. 2374 (quoting *Hines v. Davidowitz*, 312 U.S. at 67, 61 S.Ct. 399). This is because only by looking to Congress' purposes and objectives could one hope to identify what "preemption is necessary to achieve parity." Quicken does not explain what it means by this phrase, although it does distinguish it from "absolute parity," which it does not seek.

By disclaiming the standard of "absolute parity," Quicken implicitly concedes that the Parity Act does not preempt "all state restrictions on alternative mortgage transactions made by non-federally chartered creditors." Quicken argues for preemption "to the extent required for 'parity'—not 'absolute parity.'" Without offering a formulation of parity for this court to adopt, Quicken argues that "the Parity Act's preemptive scope is not limited to state restrictions that conflict with regulations identified by the OTS."

We are therefore asked to articulate the preemptive scope of the Parity Act. Notwithstanding §§ 3801(b) and 3803(c), Congress explicitly referred to the ongoing validity of state licensing requirements and "regulatory requirements and enforcement mechanisms provided by State law" governing housing creditors. 12 U.S.C. § 3802(2). Given this explicit reference, Congress did not intend to preempt all state regulation. Quicken does not seek this 'absolute parity' holding, and we do not adopt it. *See also Black*, 112 Cal.Rptr.2d at 457 (declining to read § 3801(b) to require absolute parity or complete preemption).

We must therefore determine the scope of the clause: "notwithstanding any State constitution, law, or regulation." 12 U.S.C. § 3803(c). Other courts asked to rule on the preemptive scope of the Parity Act have confronted direct conflicts between state laws and OTS regulations. *See, e.g., Nat'l Home Equity Mortgage Ass'n v. Face*, 239 F.3d 633 (4th Cir.2001) (state prepayment law); *Shinn v. Encore*

Mortgage Servs., Inc., 96 F.Supp.2d 419 (D.N.J.2000) (same); *Glukowsky v. Equity One, Inc.*, 180 N.J. 49, 848 A.2d 747 (2004) (same). This case does not present a direct conflict with an OTS regulation, nor does it present a direct conflict with the Parity Act because the per diem statutes do not prohibit alternative mortgage transactions.

The California Court of Appeals has addressed whether California's per diem statutes are preempted by the Parity Act because they "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Black*, 112 Cal.Rptr.2d at 456. That court rejected the argument that "the goal of the Parity Act is national uniformity in the regulation of state-chartered housing lenders with respect to alternative mortgage transactions" because "[g]iven the dearth of applicable federal regulations, the national uniform standard for state-chartered housing lenders would be 'anything goes.' That is hardly a uniform standard." *Id.* at 457. It specifically rejected the argument that Congress' purpose required preemption of the state laws at issue because the state claims did "not seek to prohibit or impede the making of alternative mortgage transactions that comport with the applicable federal regulations," and the claims do not "tread on the areas of federal regulation applicable to non-federally chartered housing creditors, namely, [those areas covered by regulations the OTS identified as applicable to non-federally chartered housing creditors]." *Id.* at 458.

Black's reasoning applies to this case as well. Here, California's per diem statutes do not 'tread on' an area of federal regulation which the OTS has identified as applicable to non-federally chartered housing creditors. The per diem statutes also do not prohibit the making of alternative mortgage 5606 transactions. That leaves the issue of impeding the making of alternative mortgage transactions. This essentially returns the analysis to its original point of

determining what is 'necessary to achieve parity'—i.e., what impedes the making of alternative mortgage transactions.

California's per diem statutes apply to mortgages on real property, and do not distinguish between alternative mortgages and fixed-rate, fixed-term mortgages. Cal. Civ. Code § 2948.5. The per diem statutes therefore do not impede the making of alternative mortgage transactions per se. These statutes do not apply to federally chartered housing creditors because Congress delegated "complete authority to regulate federal savings and loan associations" to the OTS. *Wash. Mut. Bank v. Superior Court of L.A. County*, 95 Cal.App.4th 606, 618, 115 Cal.Rptr.2d 765 (Cal.Ct.App.2002).

Quicken argues that because the statutes do not apply to federally chartered creditors, they should not apply to non-federally chartered creditors. However, Congress has not delegated similarly complete authority to the OTS to regulate nonfederally chartered housing creditors. 12 U.S.C. § 3802. The full purposes and objectives of Congress in enacting the Parity Act do not include delegating complete authority to regulate nonfederally chartered housing creditors to the OTS. *Id.* Section 3802(2) suggests that Congress did not intend to preempt all state laws relating to nonfederally chartered housing creditors. Indeed, § 3801 suggests that the Parity Act was intended to eliminate the discriminatory impact that regulations authorizing federally chartered depository institutions to engage in alternative mortgage financing have upon nonfederally chartered housing creditors. Section 3801 further states that it is the purpose of the Parity Act to provide nonfederally chartered housing creditors with parity by authorizing all housing creditors to make, purchase, and enforce alternative mortgage transactions so long as the transactions are in conformity with OTS regulations.

The per diem statutes do not apply exclusively to alternative mortgages, but rather are statutes of general applicability. They do not touch upon the areas identified by the OTS as

essential and intrinsic to the ability to engage in alternative mortgage transactions. The per diem statutes do not restrict a housing creditor's ability to make an alternative mortgage transaction, any more than does any statute which applies to nonfederally chartered housing creditors but not to federally chartered housing creditors. Because the California per diem statutes do not conflict with OTS regulations applicable to nonfederally chartered housing creditors; do not prohibit making, purchasing, or enforcing alternative mortgage transactions; and do not inhibit the making, purchasing, or enforcing of alternative mortgage transactions per se, they are not preempted by the Parity Act.

IV. Takings Clause

Quicken argues that the district court erred when it dismissed Quicken's takings claim as unripe. Quicken asserts that the district court applied the wrong ripeness test.

A. As-Applied Takings Claim

If Quicken is pursuing an as-applied takings claim, it must establish that (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," and (2) Quicken has sought "compensation through the procedures the State has provided for doing so." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). The district court correctly held that Quicken did not establish either of these requirements.

There is no indication in the record that Quicken sought compensation through any California procedures.

However, there are some situations in which a plaintiff need not first seek compensation from the state:

> [A] plaintiff may be excused from this requirement if he demonstrates that "the inverse condemnation procedure

> [of the state] is unavailable or inadequate." [*Williamson*, 473 U.S.] at 197, 105 S.Ct. 3108, 87 L.Ed.2d 126. In addition, "an exception exists where the state does not have a 'reasonable, certain, and adequate provision for obtaining compensation' at the time of the taking," *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101-02 (9th Cir.1998); *see also Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir.1993), or where resorting to state remedies would be futile, *see City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999).

Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 851 (9th Cir.2001) (en banc). There is no indication in the record that Quicken demonstrated that any of these exceptions apply.

B. Facial Takings Claim

On appeal, it appears that Quicken is asserting a facial takings claim that the per diem statutes do not substantially advance legitimate state interests. For this claim, "the denial of just compensation is irrelevant for purposes of ripeness." *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir.1998). Accordingly, this claim was ripe when the per diem statutes were enacted. *See id.*

However, Quicken failed to assert this facial takings claim below. At a hearing in the district court, the district judge sought to clarify what types of takings claims Quicken was making:

> THE COURT: What type of takings issue is involved? Is it a facial takings or an applied takings or both?
> MR. SANGSTER: It's an applied takings, Your Honor. And it's an applied takings because of the manner in which the Commissioner is interpreting the statute, the recording statute.

THE COURT: Okay.
MR. SANGSTER: The Commissioner—sorry.
THE COURT: So, a facial takings is not at issue, it's just applied takings?
MR. SANGSTER: I guess I haven't thought of it in the terms Your Honor—I was expecting, when Your Honor started, whether it was per se or regulatory, and I'm not focused as much on facial. It's as applied, because there is a manner in which the Commissioner could interpret this statute—
THE COURT: I have a general idea what is meant by "as applied."
MR. SANGSTER: Yes, Your Honor.
THE COURT: I'm trying to determine whether a facial taking is involved, and you are telling me that it is not involved. Is it involved in your complaint at all?
MR. SANGSTER: No, Your Honor.
THE COURT: So, your complaint just deals with an applied taking?
MR. SANGSTER: Yes, Your Honor.
THE COURT: All right.

The district court relied on this discussion in framing the takings clause issue in its order:

> At the hearing on June 30, 2003, Quicken Loans clarified that neither its Complaint nor its regulatory taking motion asserts a facial challenge against the per diem statutes; rather it challenges the Commissioner's application of the statutes to the interest Quicken Loans seeks to earn on mortgage loans.[1]

Although Quicken could have asserted a ripe facial takings claim, it expressly waived this argument.

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[1] Therefore Quicken Loans has withdrawn any facial challenge asserted in its Complaint.

CONCLUSION

For the reasons stated above, the summary judgment in favor of Quicken on the DIDMCA claim is VACATED. We AFFIRM the judgment denying Quicken a permanent injunction on the DIDMCA claim, granting summary judment on the Parity Act claim, and dismissing the takings claim.

Vacated in part, affirmed in part, and remanded. Commissioner to recover costs on appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed JUL 7, 2006]

No. 04-16244
D.C. No. CV-03-00256-GEB
Eastern District of California, Sacramento

QUICKEN LOANS, INC., a Michigan corporation,
Plaintiff-Appellant,

v.

WILLIAM P. WOOD, in his official capacity as Commissioner of the California Department of Corporations,
Defendant-Appellee.

No. 04-16312
D.C. No. CV-03-00256-GEB
Eastern District of California, Sacramento

QUICKEN LOANS, INC., a Michigan corporation,
Plaintiff-Appellee,

v.

WILLIAM P. WOOD, in his official capacity as Commissioner of the California Department of Corporations,
Defendant-Appellant.

ORDER

Before: GOODWIN, REINHARDT, and HAWKINS, *Circuit Judges*.

The panel has voted unanimously to deny the petition for panel rehearing. Judges Reinhardt and Hawkins have voted to deny the petition for rehearing en banc, and Judge Goodwin recommended denial.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing is DENIED and the petition for rehearing en banc is DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 03-16194, 03-16461, 03-16197

WELLS FARGO BANK N.A.; WELLS FARGO HOME MORTGAGE,
Plaintiffs-Appellees,

v.

DEMETRIOS A. BOUTRIS,
Defendant-Appellant.

NATIONAL CITY BANK OF INDIANA;
NATIONAL CITY MORTGAGE CO.,
Plaintiffs-Appellees,

v.

DEMETRIOS A. BOUTRIS,
Defendant-Appellant.

WELLS FARGO BANK N.A.; WELLS FARGO HOME MORTGAGE,
Plaintiffs-Appellants,

v.

DEMETRIOS A. BOUTRIS,
Defendant-Appellee.

Argued and Submitted Nov. 4, 2004
Filed Aug. 12, 2005

Before: REINHARDT, PAEZ, and BERZON, *Circuit Judges*.

BERZON, *Circuit Judge*:

In these cross-appeals concerning California's regulation of residential mortgage lenders, we decide two issues: First, does the National Bank Act ("Bank Act"), 12 U.S.C. §§ 21 *et seq.*, preempt the California Commissioner of Corporations' ("the Commissioner") exercise of investigative and licensing authority over "operating subsidiaries" of national banks? Second, does section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), 12 U.S.C. § 1735f-7a, preempt California's per diem loan-interest statute?

The district court answered both questions in the affirmative. *Wells Fargo Bank, N.A. v. Boutris*, 265 F.Supp.2d 1162 (E.D.Cal.2003) (Wells Fargo II).[1] For the reasons that follow, we affirm the district court's conclusion as to preemption under the Bank Act but hold that the per diem loan-interest statute is not preempted by the DIDMCA.

I. Background

These appeals arise out of California's attempts to require Wells Fargo Home Mortgage Inc. (WFHMI) and National City Mortgage Co. (NCMC), wholly owned subsidiaries of Wells Fargo National Bank and National City Bank of Indiana, respectively, to conduct audits of their residential mortgages. The purpose of the audits was to ascertain whether the mortgage subsidiaries had overcharged interest and provided unduly low estimates of certain classes of

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[1] We refer to the final judgment of the district court as "*Wells Fargo II* "to distinguish it from that court's earlier ruling granting in part and denying in part Wells Fargo's motion for a preliminary injunction. *See Wells Fargo Bank, N.A. v. Boutris*, 252 F.Supp.2d 1065 (E.D.Cal.2003) (*Wells Fargo I*).

settlement fees, in violation of California law.[2] From 1996 to 2003,[3] WFHMI was licensed to engage in real estate lending activities under the California Residential Mortgage Lending Act (CRMLA), Cal. Fin. Code §§ 50000 et seq.,[4] and the California Finance Lenders Law (CFLL), Cal. Fin. Code §§ 22000 et seq.[5] The Commissioner is the state official charged with enforcing those laws governing licensed home-mortgage lenders, including a statute barring lenders from charging interest during certain periods. Cal. Fin. Code § 50204(o); *see Wells Fargo II*, 265 F.Supp.2d at 1164.

To that end, the Commissioner routinely conducts regulatory examinations of licensees' records. The facts giving rise to this suit began after one such examination, when

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[2] Wells Fargo has advised this court that WFHMI recently merged back into Wells Fargo National Bank and so no longer exists as an independent entity. Because this lawsuit seeks injunctive and declaratory relief regarding an audit relating to the period before the merger, Wells Fargo's claims as to WFHMI are not moot. Further, even if they were, the legal issues presented before would still be before us, as NCMC remains an operating subsidiary of National City Bank of Indiana.

[3] For clarity, we recite the facts only as they pertain to Wells Fargo and WFHMI. There is no distinction between WFHMI and NCMC pertinent to our disposition.

[4] Specifically, the CRMLA provides that:

> No person shall engage in the business of making residential mortgage loans or servicing residential mortgage loans, in this state, without first obtaining a license from the commissioner in accordance with the requirements of Chapter 2 (commencing with Section 50120) or Chapter 3 (commencing with Section 50130), and any rules promulgated by the commissioner under this law, unless a person or transaction is excepted from a definition or exempt from licensure by a provision of this law or a rule of the commissioner.

Cal. Fin. Code § 50002(a). The licensing requirements referred to in the section are discussed in more detail below.

[5] The CFLL does not apply to any loans made pursuant to the CRMLA. See Cal. Fin. Code § 22060.

> the Commissioner demanded that WFHMI conduct an audit of its residential mortgage loans made in California during 2001 and 2002. The purpose of the audit was to identify all loans where WFHMI charged per diem interest in violation of *California Financial Code* § 50204(o), so that WFHMI could make appropriate refunds, and identify instances of understating finance charges in violation of the federal Truth in Lending Act. WFHMI objected to the Commissioner's request in a letter dated January 22, 2003, in which it asserted because it is an operating subsidiary of a national bank it is subject to the OCC's exclusive regulatory authority.

Id. (citations omitted).

Five days after sending its objection letter to the Commissioner, Wells Fargo filed this suit in the U.S. District Court for the Eastern District of California, seeking declaratory and injunctive relief. Wells Fargo's position throughout this litigation has been that the Commissioner cannot require an audit because the relevant provisions of California law from which any such authority derives are preempted by federal laws and regulations—specifically, by the Bank Act, the DIDMCA, and the regulations promulgated by the Office of the Comptroller of the Currency thereunder, 12 C.F.R. §§ 5.1 *et seq.* (2005).[6]

On February 4, 2003, eight days after Wells Fargo filed this suit, the Commissioner instituted administrative proceedings against WFHMI to revoke its California licenses. Wells Fargo sought a preliminary injunction, both to bar the administrative proceedings and to enjoin the Commissioner from continuing to exercise "visitorial" authority over

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[6] The agency, to which we interchangeably refer as the "OCC" or "Comptroller," has appeared in this case as amicus curiae. We acknowledge their helpful participation in clarifying a complex statutory scheme.

WFHMI.[7] The district court rejected the injunction application as to the revocation proceedings, but granted the preliminary injunction as to the visitorial authority issue.[8]

The parties then cross-moved for summary judgment. The district court granted Wells Fargo's motion for summary judgment on the preemption claims and the Commissioner's motion for summary judgment on the retaliation claim. The court also entered a permanent injunction against the Commissioner, barring him from "exercising visitorial powers over Plaintiffs and from enforcing *California Financial Code* § 50204(o) and *California Civil Code* § 2948.5 against

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[7] As the district court observed, "visitorial power [ ] . . . generally refers to the power of the OCC to 'visit' a national bank to examine its activities and its observance of applicable laws, and encompasses any examination of a national bank's records relative to the conduct of its banking business as well as any enforcement action that may be undertaken for violations of law." *Wells Fargo II*, 265 F.Supp.2d at 1165 n. 5 (internal quotation marks omitted). For a helpful early overview of visitorial authority under the Bank Act, *see First National Bank of Youngstown v. Hughes*, 6 F. 737, 740-42 (C.C.N.D.Ohio 1881), *appeal dismissed*, 106 U.S. 523, 1 S.Ct. 489, 27 L.Ed. 268 (1883). *See also First Union Nat'l Bank v. Burke*, 48 F.Supp.2d 132, 137-38 (D.Conn.1999); *Peoples Bank of Danville v. Williams*, 449 F.Supp. 254, 258-59 (W.D.Va.1978). On the common-law understanding of visitorial power, *see Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 673-76, 4 L.Ed. 629 (1819) (Story, J., concurring); and *Allen v. McKean*, 1 F. Cas. 489, 497-98 (C.C.D.Me.1833) (No. 229) (Story, Circuit Justice).

[8] In granting the preliminary injunction in part and denying it in part, the district court ruled that "the Commissioner is preliminarily enjoined from exercising visitorial powers over Plaintiffs or from otherwise preventing WFHMI from operating in California; however, the portion of Plaintiffs' motion seeking to preliminarily enjoin the Commissioner from revoking WFHMI's California issued licenses is denied." *Wells Fargo I*, 252 F.Supp.2d at 1074. The court refused to enjoin the license revocation because "[i]t would be ironic for an injunction to issue in such circumstances since WFHMI could have avoided the harm it contends it will suffer had it chosen to comply with the requirements of the California licenses it possesses." *Id.* (internal quotation marks omitted).

Plaintiffs." Wells Fargo II, 265 F.Supp.2d at 1179. These appeals followed.

II. Bank Act Preemption

As we observed three years ago:

> Congress has legislated in the field of banking from the days of *M'Culloch v. Maryland*, creating an extensive federal statutory and regulatory scheme. The history of national banking legislation has been "one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law."

Bank of Am. v. City & County of San Francisco, 309 F.3d 551, 558 (9th Cir.2002) (quoting *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996)) (citation omitted).

In light of this history, we held in *Bank of America* that the usual presumption against federal preemption of state law is inapplicable to federal banking regulation. See 309 F.3d at 558-59. Thus, "[i]n defining the pre-emptive scope of statutes and regulations granting a power to national banks,[the Supreme Court's jurisprudence] take[s] the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Barnett Bank*, 517 U.S. at 33, 116 S.Ct. 1103. As shall become apparent, our analysis draws on these animating principles of federal primacy and exclusivity in the field of banking regulation. *Cf. Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003) (recognizing "the special nature of federally chartered banks").

A. Operating Subsidiaries and the Bank Act

At the core of these appeals is 12 C.F.R. § 7.4006, a regulation promulgated by the OCC in 2001, which states:

"Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." *See Investment Securities; Bank Activities and Operations; Leasing*, 66 Fed.Reg. 34,784, 34,788-89 (July 2, 2001). Section 7.4006 does not define "operating subsidiary." Instead, the term is defined, indirectly, in both the Bank Act and OCC regulations, as a subsidiary that "engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. § 24a(g)(3)(A); *see also* 12 C.F.R. § 5.39(d)(6)(i).[9] The federal banking statutes do not otherwise mention operating subsidiaries.

The Commissioner's central contention is that this regulation is beyond the scope of the OCC's delegated authority. More specifically, the Commissioner maintains that because operating subsidiaries are not, themselves, "national banks," they are therefore not subject to exclusively federal regulation

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[9] The definition is indirect because it is contained within the exceptions to the definition of "financial subsidiary" in 12 U.S.C. § 24a(g)(3) and 12 C.F.R. § 5.39(d). A financial subsidiary, by contrast, is "any company that is controlled by 1 or more insured depository institutions other than a[n operating] subsidiary [or a subsidiary that] . . . a national bank is specifically authorized by the express terms of a Federal statute (other than this section), and not by implication or interpretation, to control. . . ." 12 U.S.C. § 24a(g)(3).

In the original version of current 12 C.F.R. § 5.34, the comprehensive rule governing "operating subsidiaries" to which we return shortly, an operating subsidiary was defined as "a corporation the functions or activities of which are limited to one or several of the functions or activities that a national bank is authorized to carry on." Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed.Reg. 11,459, 11,459 (Aug. 31, 1966) (formerly codified at 12 C.F.R. § 7.10) [hereinafter "Operating Subsidiary Rule"]. The current regulation, codified at § 5.34, contains no such definition.

to the same extent as are national banks. His argument therefore challenges the propriety of the regulation, raising a question of first impression in this circuit.[10] Although posed in the singular, the question whether the OCC may preempt contrary state law as applied to operating subsidiaries of national banks depends, in our view, on the answer to two logically prior questions: First, we must resolve whether the OCC regulation allowing national banks to create and operate subsidiaries that perform national bank functions is consistent with the Bank Act. Second, we need to consider whether the OCC may regulate such entities. Only after answering these first two questions can we decide whether the OCC may regulate such entities to the exclusion of the states in the two areas pertinent here—visitorial authority and licensing requirements.

One final point bears mention at the outset: Because the parties' arguments turn almost entirely on the OCC's interpretation of the Bank Act, a necessary threshold question to our analysis here is whether, and to what extent, the OCC's implementation of the Act, as manifested in § 7.4006, is entitled to deference.

The OCC is the agency "charged with supervision of the National Bank Act." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256, 115 S.Ct. 810, 130

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[10] Besides the district court in this case, the other courts that have ruled on this specific issue (which appears to have been litigated only since the promulgation of 12 C.F.R. § 7.4006 in July 2001) are the Second Circuit, *see Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir.2005), and the U.S. District Courts for the District of Maryland, *see Nat'l City Bank of Ind. v. Turnbaugh*, 367 F.Supp.2d 805 (D.Md.2005), and the Western District of Michigan, *see Wachovia Bank, N.A. v. Watters*, 334 F.Supp.2d 957 (W.D.Mich.2004), *appeal docketed*, No. 04-2257 (6th Cir. Oct. 14, 2004). Each of the other courts held, as did the district court here and as do we, that the Bank Act preempts the relevant state laws.

L.Ed.2d 740 (1995). Its rule-making authority is codified at 12 U.S.C. § 93a, which provides:

> Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred by this section does not apply to section 36 of this title [the McFadden Act] or to securities activities of National Banks under the Act commonly known as the "Glass-Steagall Act".

As the definition makes clear, this conferral of regulatory authority is as broad as the OCC's statutory responsibilities, defined piecemeal throughout the Bank Act. *See, e.g.*, 12 U.S.C. §§ 25a(e), 26, 29, 71, 84(d), 92, 92a(a), 93(d), 211(a), 371, 481, 633(b); *see also Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 883 (D.C.Cir.1983) (per curiam).[11]

Given this rulemaking authority, the OCC's interpretation of ambiguous language in the Bank Act is entitled to deference under the two-step framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984):

> Under the familiar two-step analysis in Chevron, if Congress has "directly spoken to the precise question at issue," then the matter is capable of but one interpretation by which the court and the agency must abide. By contrast, where we determine that a statute is not

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[11] The Supreme Court has affirmed that the OCC is the agency generally responsible for the administration of the Bank Act, citing 12 U.S.C. §§ 1, 26-27, and 481 in support of that conclusion. *See NationsBank*, 513 U.S. at 256, 115 S.Ct. 810; *see also Inv. Co. Inst. v. Camp*, 401 U.S. 617, 626-27, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971) (citing *First Nat'l Bank v. Missouri*, 263 U.S. 640, 658, 44 S.Ct. 213, 68 L.Ed. 486 (1924)).

> clear, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."

Vigil v. Leavitt, 381 F.3d 826, 834 (9th Cir.2004) (quoting *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778). As the statutory interpretation issues we must address to determine the validity of § 7.4006 devolve into separate questions, as we have explained, the relevant authority for each inquiry has separate statutory sources, and the *Chevron* inquiry is necessarily step-by-step. We therefore proceed to analyze the validity of § 7.4006—and the appropriate deference, if any, to accord to the OCC's relevant interpretations—incrementally.

B. The OCC's Authority To Allow National Banks To Operate Through Operating Subsidiaries

As noted, the Bank Act is silent regarding "operating subsidiaries."[12] Congress has thus not addressed, except indirectly, whether banks may organize and delegate banking functions to such entities in the first place. The Bank Act, however, does bestow upon national banks the authority "[t]o exercise by its board of directors or duly authorized officers or agents, subject to law, all such *incidental* powers as shall be necessary to carry on the *business of banking*; . . . ." 12

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[12] The Commissioner argues that Congress's silence in the Bank Act regarding operating subsidiaries resolves step one of the *Chevron* inquiry in his favor. The district court in *Wachovia Bank, N.A. v. Burke* explained why this *expressio unius* argument must fail: "While this silence might have been significant to the court were it to interpret the statute *de novo*, it does not answer the question asked by the first step of *Chevron*—namely, whether Congress has 'unambiguously expressed [its] intent.'" 319 F.Supp.2d 275, 285 n. 5 (D.Conn.2004) (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778) (alteration in original), *aff'd in part, rev'd and vacated in part on other grounds*, 414 F.3d 305 (2d Cir.2005). We agree. The absence of any reference to operating subsidiaries in the Bank Act does not unambiguously provide that national banks may not create and perform banking functions through such entities.

U.S.C. § 24(Seventh) (emphasis added). This "incidental powers" provision is central to our analysis here, as it is the basis for the OCC's permission to national banks to create and operate banking functions, through subsidiaries.

Because § 24(Seventh) is not explicit on the limits of "incidental powers," the OCC is entitled to Chevron step-two deference as to whether the Bank Act supports the creation of operating subsidiaries pursuant to that provision. *See Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 640 (D.C.Cir.2000) (holding that the "incidental powers" provision permits "the Comptroller [to] authorize additional activities if encompassed by a reasonable interpretation of § 24(Seventh)"). Our inquiry, then, is whether the agency interpretation allowing operating subsidiaries as an exercise of "incidental powers" is reasonable. *See, e.g., Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 357 F.3d 1012, 1015 (9th Cir.2004) (citing *Barnhart v. Walton*, 535 U.S. 212, 217-18, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002)). We hold that it is.

The Supreme Court has approved the OCC's interpretation of the "incidental powers" provision as permitting a range of bank authority beyond that specified in the statute. As the Court has noted, because "the 'business of banking' is not limited to the enumerated powers[[13]] in § 24 Seventh . . . the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated." *NationsBank*, 513 U.S. at 258 n. 2, 115 S.Ct. 810; *see also Bank of Am.*, 309 F.3d at 562. At the same time, "[t]he exercise of the Comptroller's discretion, however, must be kept within reasonable bounds. Ventures distant from dealing in financial

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[13] Section 24(Seventh) mentions some of the banks' powers, including "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt," "receiving deposits," "buying and selling exchange, coin, and bullion," "loaning money on personal security," and "obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes [the Bank Act]."

investment instruments—for example, operating a general travel agency—may exceed those bounds." *NationsBank*, 513 U.S. at 258 n. 2, 115 S.Ct. 810.[14]

We have endorsed the approach adopted by the First Circuit in *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir.1972), for delineating the scope of "incidental powers" under § 24(Seventh):

> [A] national bank's activity is authorized as an incidental power, "necessary to carry on the business of banking," within the meaning of 12 U.S.C. § 24, Seventh, if it is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act. If this connection between an incidental activity and an express power does not exist, the activity is not authorized as an incidental power.

Id. at 432, *quoted in M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir.1977); *see also Nat'l Retailers Corp. of Ariz. v. Valley Nat'l Bank of Ariz.*, 604 F.2d 32, 33 (9th Cir.1979) (per curiam) (discussing our adoption of *Arnold Tours* in *M & M Leasing*). Applying this standard, we agree with the district court that the Comptroller had the authority under § 24(Seventh) to permit banks to delegate some of their banking functions to operating subsidiaries.

Allowing national banks to create, control, and delegate banking functions to operating subsidiaries provides some assistance to banks in performing their authorized activities. Indeed, the stated considerations motivating the initial

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[14] Congress, not the OCC, has explicitly authorized national banks to engage in real estate lending. *See* 12 U.S.C. § 371(a). The Commissioner's argument, at various points in his briefs, that the regulation of real estate lending falls outside the substantive scope of the OCC's delegated authority is therefore unavailing.

adoption of the operating subsidiary rule in 1966 were that developing such subsidiaries would aid banks in "controlling operations costs, improving effectiveness of supervision, [providing for] more accurate determination of profits, decentralizing management decisions[,] or separating particular operations of the bank from other operations." Operating Subsidiary Rule, 31 Fed.Reg. at 11,460. At the same time, permitting operating subsidiaries does not expand the functions carried out by the banks. The determination whether to conduct business through operating subsidiaries or, instead, through subdivisions of the bank itself is thus essentially one of internal organization, so long as the operating subsidiary form of organization cannot be used to evade the rules that apply to national banks. Under 12 C.F.R. § 5.34, the rule governing operating subsidiaries, such evasion is not permitted. *See* 12 C.F.R. § 5.34(e)(1) (providing that "[a] national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC, or otherwise under other statutory authority"); *id.* § 5.34(e)(3) ("An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank.").

Allowing national banks to conduct business through operating subsidiaries is therefore a permissible construction of those banks' incidental powers under the Bank Act. We hold that the OCC's interpretation of 12 U.S.C. § 24(Seventh) as authorizing it to allow national banks to conduct business through operating subsidiaries is a permissible one.

C. The OCC's Authority To Regulate Operating Subsidiaries

That the Bank Act may be construed as allowing private national banks to conduct business through operating subsidiaries does not, however, necessarily resolve whether the Act also delegates to the OCC the authority to regulate such

entities. That is to say, § 24(Seventh) concerns the incidental powers of national banks, not the extent of the OCC's regulatory authority. Determining the reach of that authority is a separate question, involving the interpretation of 12 U.S.C. § 93a.

Section 93a, like the rest of the Bank Act, is silent as to the OCC's authority to regulate operating subsidiaries. This court has recognized, however, that the OCC's authority to interpret the reach of the "incidental powers" conferred by § 24(Seventh) necessarily includes the authority to regulate the exercise of those powers to assure that they remain "incidental" to the "business of banking."

We so held in *M & M Leasing*, in which the central question was whether the leasing of automobiles by national banks was within the "incidental powers" of such banks, as the Comptroller had determined. After determining that, within limits, it is, we made clear that the Comptroller has both the authority and the "duty" "to promulgate reasonably detailed regulations which will confine leasing within the channels of the 'business of banking.'" 563 F.2d at 1384. *M & M Leasing's* conclusion that "[p]reparation of a comprehensive charter [for the exercise of "incidental powers"] is a function that belongs to the Comptroller," *id.*, necessarily makes the promulgation of such regulations one of the "responsibilities of the office" contemplated by § 93a, as to which the Commissioner has rulemaking power.

M & M Leasing's logic applies here. Just as the Comptroller's authority to regulate national banks' leasing activities is inherent in his authority to interpret the "incidental powers" provision to allow such leasing in the first place, his authority to regulate operating subsidiaries also follows from the OCC's authority to allow such entities.

Further, the OCC operating subsidiary regulations most pertinent to the present inquiry quite directly address the

reach of the national banks' "incidental powers" authority to create and conduct their business through such entities. Those regulations, quoted above, restrict the range of activities that operating subsidiaries may conduct to those in which their parent banks may engage, see 12 C.F.R. §§ 5.34(e), 5.39(d)(6)(i), and state that such subsidiaries are subject to the same federal rules and standards "that apply to the conduct of such activities by its parent national bank." *Id.* § 5.34(e)(3). These provisions ensure that the decision to conduct banking activities through subsidiaries neither expands the national banks' scope of activities nor undermines the authority of the OCC to regulate those activities. By establishing these principles, the regulations circumscribe the decision to use operating subsidiaries so that it remains only "incidental" to the "business of banking."

In regulating the conduct of operating subsidiaries, moreover, the OCC is regulating only those activities it is explicitly authorized to regulate under the Bank Act. For federal regulatory purposes, in other words, the OCC is treating each operating subsidiary for the most part as if it were a national bank itself, conducting the same activities. In the latter instance, of course, the OCC's regulatory authority is unquestioned. As we concluded twenty-eight years ago, "whatever the scope of such [incidental] powers may be, we believe the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *M & M Leasing*, 563 F.2d at 1382.

We conclude that the OCC has permissibly applied 12 U.S.C. § 93a to regulate operating subsidiaries of national banks.

D. The OCC's Exclusive Authority To Regulate Operating Subsidiaries

As the Supreme Court has explained:

> When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is . . .

> limited: "If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 154, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982) (quoting *United States v. Shimer*, 367 U.S. 374, 383, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961)) (alteration in original); *see also La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 369, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986) ("Preemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."); *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir.2005); *Lopez v. Wash. Mut. Bank, FA*, 302 F.3d 900, 906 (9th Cir.2002), *amended by* 311 F.3d 928 (9th Cir.2002).

Applying these principles here, we conclude that promulgating § 7.4006 was within the OCC's authority. Section 7.4006 provides that a state law is preempted as applied to an operating subsidiary only if it would be preempted as applied to a national bank. By so stating, the OCC has simply explicated further its specification, in 12 C.F.R. § 5.34(e)(1) and (3), that operating subsidiaries are to have the same authority as, and be subject to the same governmental regulation as, their national banks parents, by making clear in § 7.4006 that the principle is symmetrical: Operating subsidiaries are subject to no less *and* no more governmental regulation, state and federal, than national banks. The connection between the OCC's substantive determinations regarding the authority of national banks to conduct their business through operating subsidiaries and the preemption regulation is thus close and logical. We are therefore convinced that once the OCC's authority to allow the creation

of and to regulate operating subsidiaries as it has done is established, its authority to displace contrary state regulation where the Bank Act itself preempts contrary state regulation of national banks follows.[15] That § 7.4006 is "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," *Fidelity*, 458 U.S. at 154, 102 S.Ct. 3014 (internal quotation marks omitted), is further supported by an unusual provision in the Bank Act itself. Indeed, 12 U.S.C. § 43 specifically contemplates that the OCC sometimes has authority to preempt state laws such as those here at issue. *See* 12 U.S.C. § 43 (setting procedural prerequisites for OCC regulations preempting "[s]tate law regarding community reinvestment, *consumer protection*, fair lending, or the establishment of intrastate branches" (emphasis added)).[16]

With this general approval of the OCC's preemptive authority regarding state law regulation of national bank operating subsidiaries in mind, we turn to the specific state laws that WFHMI and the OCC maintain are preempted under § 7.4006.

1. Visitorial Power Under the Bank Act

WFHMI and the OCC submit that the Commissioner's state law authority to conduct or require audits of national

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[15] Accord Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2d Cir.2005) (holding the Bank Act and OCC regulations preempt state banking laws concerning subsidiaries of nationally chartered banks to the same extent that they preempt regulation of the parent national bank).

[16] As the Commissioner here maintains, the laws he is seeking to enforce concern consumer protection. Section 43 prescribes the procedures that "the appropriate Federal banking agency," in this instance the OCC, *see* 12 U.S.C. § 1813(z), must follow whenever it issues an "opinion letter or interpretive rule" concluding that certain state laws, including consumer protection laws, are preempted as applied to national banks, *see id.* § 43(a). There is no allegation in this case that the OCC did not follow the requisite procedures.

bank operating subsidiaries is displaced by § 7.4006. Their argument, with which we agree, is that section 54 of the Bank Act, 12 U.S.C. § 484, makes federal "visitorial" authority—but not necessarily federal substantive law—exclusive with regard to national banks, and § 7.4006 extends that exclusivity to operating subsidiaries.

Since shortly after the Bank Act was enacted in 1864,[17] *see Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362, 19 L.Ed. 701 (1870), the Supreme Court has oft reiterated that federal substantive authority over national banks is not exclusive. Rather, states may regulate national banks where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 33, 116 S.Ct. 1103; *see also id.* (citing cases). "Thus, states retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law." *Bank of Am.*, 309 F.3d at 559.

One area of authority over national banks that has historically been the exclusive province of the federal government, however, is the "visitorial" power. For purposes of the Bank Act and OCC regulations, the OCC has defined "visitorial" power as "(i) [e]xamination of a bank; (ii) [i]nspection of a bank's books and records; (iii) [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) [e]nforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. § 7.4000(a)(2). The exclusivity of federal

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[17] Although the Bank Act was promulgated in 1864, the current banking statutes largely derive from the Bank Act's immediate predecessor, the National Currency Act of 1863, ch. 58, 12 Stat. 665. *See U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 449 & n. 4, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (summarizing the statutory history).

visitorial authority over national banks is codified in the Bank Act, section 54 of which provides that:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

12 U.S.C. § 484(a).[18]

As the definition makes clear, the preemption of state law accomplished by § 484(a) is entirely procedural, not substantive. The exclusively federal power to "visit" national banks is not the power to oust all state regulation of those entities. Instead, the exclusivity of visitorial authority preempts only *enforcement* of state visitation laws by *state officials*, subject to the exceptions stated in § 484(a) itself. *See, e.g., Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 989 (3d Cir.1980); *cf. Conference of Fed. Sav. & Loan Ass'ns v. Stein*, 604 F.2d 1256, 1260 (9th Cir.1979) (holding that regulatory control provided by California's Housing Financial Discrimination Act is procedurally preempted by Federal Home Loan Bank Board authority), *summarily aff'd*, 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754 (1980) (mem.). National banks remain bound by state laws and regulations, except for those laws substantively preempted by other provisions of the Bank Act.

Still, despite its procedural limitation, § 484(a) does "evidence [ ] a broad intent to preempt state law as to national banks." *Wachovia Bank, N.A. v. Burke*, 319 F.Supp.2d 275, 279 (D.Conn.2004), *aff'd in part, rev'd and vacated in part*

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[18] But for minor technical corrections in 1913 and 1982, the provision remains unchanged from its initial codification in 1864. *See* Act of June 3, 1864, ch. 106, § 54, 13 Stat. 99, 116.

on other grounds, 414 F.3d 305 (2d Cir.2005); *see also Guthrie v. Harkness*, 199 U.S. 148, 159, 26 S.Ct. 4, 50 L.Ed. 130 (1905) ("It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power."); *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412, 21 L.Ed. 862 (1873). The power the Commissioner claimed in ordering WFHMI and NCMC to audit their loan records rests on precisely the inspection and enforcement authority pre-empted by § 484(a). The OCC's conclusion that § 484(a) and § 7.4006, taken together, foreclose the exercise of such authority by the states, is thus eminently "permissible." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778.

We hold that the Commissioner is preempted from ordering regulatory audits of national bank operating subsidiaries such as WFHMI and NCMC, and that the injunction issued by the district court is valid insofar as it precludes the Commissioner from doing so.

2. Licensing Authority Under the Bank Act

WFHMI and, particularly, the OCC also argue that California's state real-estate lending licensing requirements are preempted as applied to national bank operating subsidiaries.

The state law requirements here at issue are codified in sections 50120-50130 of the California Finance Code, part of the CRMLA.[19] Although the licensing requirements as a whole are too exhaustive to recount here, the most significant provisions are section 50121, which imposes four conditions

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[19] We focus here on the CRMLA licensing requirements. The CFLL licensing requirements, which, as noted above, are relevant only where the CRMLA does not apply, *see ante* at 10461 n. 5, are codified at Cal. Fin. Code §§ 22100-22112.

on the granting of a license,[20] and section 50125(a), which empowers the Commissioner to refuse to issue a license if "[t]he applicant is not in material compliance with a provision of [the CRMLA] or an order or rule of the commissioner."

In light of the foregoing discussion, one might expect that the proper route to evaluating whether the state law provisions can apply to national bank operating subsidiaries would be to apply the same analysis we applied to the visitorial preemption issue: If state licensing requirements are preempted as applied to national banks, then § 7.4006 precludes applying those requirements to operating subsidiaries. As it turns out, this straightforward approach does not work as applied to licensing requirements.

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[20] Specifically, the provision authorizes the Commissioner to issue a license only after:

> (a) The filing with the commissioner of a complete and verified application for licensure.
>
> (b) The filing as an exhibit to the application of a listing of material judgments filed against, and bankruptcy petitions filed by, the applicant for the preceding five years, and the disposition thereof.
>
> (c) The payment of a nonrefundable investigation fee of one hundred dollars ($100), plus the cost of fingerprint processing and clearance, and an application filing fee of nine hundred dollars ($900).
>
> (d) An investigation of the statements required by [*California Financial Code* §] 50124 based upon which the commissioner is able to issue findings that the financial responsibility, criminal records (verified by fingerprint, at the discretion of the commissioner), experience, character, and general fitness of the applicant and of the partners or members thereof, if the applicant is a partnership or association, and of the principal officers and directors thereof, if the license applicant is a corporation, support a finding that the business will be operated honestly, fairly, and in accordance with the requirements of this division.

Cal. Fin. Code § 50121.

Licensing is one mode of regulation as to which there is no ready parallel between national banks and their operating subsidiaries. The California licensing requirements at issue here, for example, do not apply to national banks. *See* Cal. Fin. Code § 50003(g)(1) (exempting from the CRMLA's licensing requirements "[a]ny bank . . . doing business under the authority of or in accordance with a license, certificate, or charter issued by the United States"); *see also id.* § 22050(a) (providing that the CFLL's licensing requirements do not apply to "any person doing business under any law of this state or the United States relating to banks").

That California saw fit to exempt national banks from its mortgage-lending licensing requirements despite their prevalent activity in that area of business may well reflect the state's own conclusion—almost certainly a correct one—that the chartering of national banks by the federal government is an exclusive function, inconsistent with state licensing requirements unless they are federally authorized.[21] Operating subsidiaries, however, are not directly chartered by the federal government; instead, they are incorporated under a state's law—WFHMI in California; NCMC in Ohio. This chartering distinction is the one irreducible difference between national banks and their operating subsidiaries, and precludes the direct transfer of the banks' immunity from state entry barriers, such as licensing requirements, to their operating subsidiaries.

We are convinced, however, by the OCC's alternative argument—that California's attempt to license operating subsidiaries is field-preempted by the OCC's own licensing regulations.[22]

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[21] The Bank Act itself refers to the charter as the "organization certificate," which is created by the bank according to the terms of 12 U.S.C. §§ 21-23, and approved by the Comptroller pursuant to the procedures set forth in 12 U.S.C. §§ 26-27.

[22] The substantive limits of the Bank Act's express preemption provi-

The OCC regulations establish a comprehensive and finely calibrated scheme for the creation of operating subsidiaries. Denominated "Licensing Requirements," *see* 12 C.F.R. § 5.34(b), these regulations prescribe the specific circumstances in which a national bank needs formal approval from the OCC to establish operating subsidiaries.

A national bank must ordinarily "submit an application to, and receive approval from, the OCC," before it acquires or establishes any operating subsidiary. *See id.* § 5.34(e)(5)(i)(A). "The application must include a complete description of the bank's investment in the subsidiary, the proposed activities of the subsidiary, the organizational structure and management of the subsidiary, the relations between the bank and the subsidiary, and other information necessary to adequately describe the proposal." *Id.*

In some circumstances, national banks can create or acquire an operating subsidiary without OCC approval, although notice to the OCC is required: Under 12 C.F.R. § 5.34(e)(5)(iv), operating subsidiaries can be established by a "well capitalized" and "well managed" national bank (as defined by 12 C.F.R. § 5.34(d)(2)-(3)) solely by providing notice to the OCC, so long as the activity falls within one of twenty-five categories specifically delineated in 12 C.F.R. § 5.34(e)(5)(v). No notice is required, however, for a well-capitalized bank to establish an operating subsidiary, if the new subsidiary is conducting activities already approved for an earlier operating subsidiary of the same bank; those activities are legally permissible for the subsidiary; and the

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sions do not preclude the possibility of implicit preemption. "[T]he inclusion of an express preemption provision in a statute does not by itself obviate implied preemption. . . ." *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 387 (9th Cir.1995); *see also Ass'n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 404 (6th Cir.2001) (citing *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692 (1944)).

new subsidiary abides by any conditions the OCC imposed on the activities of prior operating subsidiaries of that bank. *See id.* § 5.34(e)(5)(vi). If the bank, however, "controls the subsidiary but owns 50 percent or less of the voting (or similar type of controlling) interest of the subsidiary," then an application and OCC approval are always necessary, and the exceptions noted above are inapplicable. *See id.* § 5.34(e)(5)(i)(B). The OCC thus has a role in either pre-approving or later reviewing the creation of an operating subsidiary in most instances.

That the OCC has chosen to require formal agency approval in certain cases but not in others, to require notice in certain cases but not in others, and to specify the content of the application or notice in great detail indicates to us that § 5.34 manifests the OCC's intent to regulate pervasively the field of licensing operating subsidiaries. Allowing certain national banks to create certain classes of operating subsidiaries without case-by-case approval is itself a regulatory decision. Where such a decision not to regulate represents, as in § 5.34, a considered determination that no regulation is appropriate, that choice preempts contrary state law imposing governing standards. *See, e.g., Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 140, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) (holding that, by regulating certain forms of economic pressure used during labor disputes but not others, Congress expressed a clear intent to leave other economic weapons free from federal or state regulation). Such field preemption can occur when an agency, acting pursuant to its delegated authority, promulgates regulations that evidence a clear intent to occupy a specific field. *See, e.g., R.J. Reynolds Tobacco Co. v. Durham County, N.C.*, 479 U.S. 130, 149, 107 S.Ct. 499, 93 L.Ed.2d 449 (1986) ("[W]here, as in this case, Congress has entrusted an agency with the task of promulgating regulations to carry out the purposes of a statute, as part of the pre-emption analysis we must consider whether the regulations

evidence a desire to occupy a field completely." (citation omitted)).

As we emphasized earlier, Congress and the OCC, acting pursuant to congressional authority, have left some room for substantive regulation by the states in the field of banking. In the specific context of licensing requirements for operating subsidiaries authorized only to conduct those activities that their parent national banks may conduct, however, the OCC's regulations "evidence a desire to occupy a field completely."[23] *Id.* A state's attempt to require advance licensing before an operating subsidiary may engage in the activities covered by the Bank Act, including real estate lending, runs headlong into the OCC's finely nuanced licensing scheme.

We hold that California's real-estate lending licensing requirements as applied to operating subsidiaries of national banks are field-preempted by 12 C.F.R. § 5.34.

III. DIDMCA Preemption

Wells Fargo also maintains that the California "per diem" loan-interest statute the Commissioner sought to enforce, precluding the charging of mortgage interest during certain pre-recordation periods, is substantively preempted by the DIDMCA. Despite our earlier rulings, we must decide this substantive preemption issue because it is pertinent to the reach of the permanent injunction the district court may properly issue.

In relevant part, the DIDMCA express preemption provision, section 501(a)(1), mandates that "[t]he provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or

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[23] Whether the preemption analysis would be the same for all OCC licensing of national bank subsidiaries, including financial subsidiaries, is a question not before us, and one on which we express no opinion.

reserved shall not apply to any loan, mortgage, credit sale, or advance . . . ." that meets certain conditions. 12 U.S.C. § 1735f-7a(a)(1); *see also Brown v. Investors Mortgage Co.*, 121 F.3d 472, 475 (9th Cir.1997) (per curiam) (summarizeing and applying the statute). Neither party disputes that WFHMI's home-lending activities here at issue meet the other conditions imposed by the DIDMCA exemption. The debate is solely whether the California per diem interest statute "expressly limit[s] the rate or amount of interest."

The California statutory provision with which we are concerned is Cal. Civ. Code § 2948.5(a).[24] At the relevant times,[25] that section provided:

A borrower shall not be required to pay interest on a principal obligation under a promissory note secured by a mortgage or deed of trust on real property improved with between one to four residential dwelling units for a period in excess of one day prior to recording of the mortgage or deed of trust if the loan proceeds are paid into escrow or, if there is no escrow, the date upon which the loan proceeds have been made available for withdrawal as a matter of right, as specified in subdivision (d) of Section 12413.1 of the Insurance Code.

If a congressional statute includes a provision explicitly preempting state law, the only issue we must decide is its

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[24] The district court referenced section 50204(o) of the California Finance Code, which bars CRMLA licensees from "[c]ommit[ting] an act in violation of Section 2948.5 of the Civil Code." Our holding that the CRMLA licensing requirements are preempted means that section 50204(o) is (and was) not enforceable against operating subsidiaries. The applicability of section 2948.5, however, does not turn on whether the lender is a licensee. Our conclusion that California's licensing requirements are preempted therefore does not moot the DIDMCA preemption issue.

[25] The provision has since been amended, and now bars the collection of per diem interest more than one day before disbursement, as opposed to before recordation.

scope, using ordinary tools of statutory construction. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517-18, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992); *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 928 (9th Cir.2003). The determinative question under the DIDMCA preemption provision, 12 U.S.C. § 1735f-7a(a)(1), is thus whether section 2948.5(a) serves "*expressly*" to limit the "rate or amount of interest" that WFHMI may assess against California borrowers.

The district court concluded that it does. In its words:

> California's per diem statutes limit the time during which interest can be charged by prohibiting a lender from charging interest on loaned mortgage funds for a period in excess of one day prior to recordation of the mortgage. By restricting the time period in which a lender may collect interest on loaned mortgage funds, the language of the per diem statutes "expressly limit[s] the rate or amount of interest . . . which may be charged. . . ."

Wells Fargo II, 265 F.Supp.2d at 1175 (quoting 12 U.S.C. § 1735f-7a(a)(1)) (alteration in original) (citations omitted).

We do not agree with this interpretation of the DIDMCA. We are instead convinced by the First Circuit's analysis in *Grunbeck v. Dime Savings Bank of New York*, FSB, 74 F.3d 331 (1st Cir.1996), and believe it fully applicable to California's per diem loan-interest statute.

In *Grunbeck*, the court considered whether section 501(a)(1) of the DIDMCA preempted New Hampshire's simple interest statute (SIS), which required lenders to compute their interest rate by summing "simple interest," *i.e.*, by not charging interest on unpaid interest. *See* N.H. REV. STAT. ANN. § 397-A:14. Dime Savings Bank argued that requiring lenders to abide by the SIS would implicate the "rate or amount of interest" chargeable against the borrower, and that the SIS

was therefore preempted by the DIDMCA. The First Circuit held that there was no DIDMCA preemption, for two primary reasons, both persuasive and both applicable here:

First, *Grunbeck* emphasized that the DIDMCA is concerned with only the "rate" and "amount" of interest charged, not with other features of the interest calculation:

> [Dime Savings Bank's] arguments rest on the implicit premise that the "amount" of interest the lender may charge is "limited" by the SIS. On the contrary, the SIS imposes no restriction on either the "rate" or the "amount" of interest the borrower may be charged, but merely requires that *any* interest rate or amount agreed to by the parties be *computed* on a "simple interest" basis. Thus, nothing in the SIS prevents a lender from contracting for whatever *simple* interest rate will exact an interest return equal to or greater than whatever rate and amount of interest would be recoverable through compounding. The SIS leaves entirely to the parties the rate and amount of simple interest to be exacted.

Id. at 337.

Here, similarly, the only direct restriction was on the time for which interest may be charged, not on the rate that may be charged when interest is in effect or the total amount of interest that may be charged over the life of the loan.[26] Banks were free to alter the post-recordation rate of interest to account for any pre-recordation no-interest period, thereby collecting the same total amount of interest as they would have collected had they charged interest pre-recordation. We agree with the First Circuit's approach, and hold that where "rates" and "amounts" of interest remain fully adjustable so

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[26] However compounded, an interest rate is usually defined as "a percentage of the principal payable for a one-year period," BLACK'S LAW DICTIONARY 831 (8th ed.2004)-that is to say, a certain percent *per year*.

that banks can obtain the same return that they would have otherwise, a state regulation is not banned by the DIDMCA.

Second, and relatedly, *Grunbeck* gave careful attention to an unusual feature of the language of section 501(a)(1) of the DIDMCA—that it preempts only express limitations on rates and amounts of interest. As *Grunbeck* explained, this textual feature must be given effect by "focus[ing] . . . on whether the 'express' language of the [state statute] 'limit[s]' the rate or amount of interest which the lender may charge," *not* "on broad-gauged assessments concerning the likely *impact* the [state] ban on compounding would have on home-mortgage lenders and the industry at large." *Id.* at 337-38 (third alteration in original). Any other "analytic focus . . . undermines the required 'plain language' interpretation by extirpating—from the pivotal section 501(a) clause: 'expressly limiting the rate or amount of interest'—the important modifier 'expressly.'" *Id.* at 337 (citation omitted).

With this textual analysis we agree as well. Here, as in *Grunbeck*, there may well be practical reasons why banks will not adjust their rates or amounts of interest to account for the state restriction. As *Grunbeck* held, however, the DIDMCA does not apply because of "likely *impact*," as long as there is no *express* limitation on interest rates or amounts.[27]

Wells Fargo argues that, aside from any impact theory, the California per diem statute *does* expressly limit an interest rate—it limits interest to zero percent for the period prior to recordation. While clever, this argument again disregards the critical and unusual modifier, "expressly."

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[27] For reasons identified by *Grunbeck*, Quicken's argument that we should defer to the interpretation of the federal Office of Thrift Supervision is deficient. *See Grunbeck*, 74 F.3d at 336 ("Where Congress has spoken directly to the issue, an interpretation rendered by the agency responsible for administering the statute is entitled to no special deference." (citing *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778)).

"Expressly" the per diem interest statute addresses only the time period for which interest may be assessed, not the rate of interest permissible for a period during which some interest is payable. It would be odd to refer to a prohibition on collection of interest as a limitation specifically on the *rate* of interest, as opposed to a limitation on the imposition of interest or on the time period which interest may cover. Also, the evident purpose of the statute, albeit imperfectly addressed, is to protect consumers by providing an incentive for completion of tasks necessary to perfect the purchase, not to limit the rate or amount of interest paid; as long as recordation was completed, any amount of interest could be charged.

For these reasons, we hold that California's per diem interest statute, Cal. Civ. Code § 2948.5, is not preempted by section 501(a)(1) of the DIDMCA, 12 U.S.C. § 1735f-7a(a)(1).

Conclusion

As Justice Jackson forcefully put it a half-century ago, "[w]e cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy." *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 378-79, 74 S.Ct. 550, 98 L.Ed. 767 (1954).

"[A]s a matter of supremacy," the Bank Act, read together with 12 C.F.R. § 7.4006, preempts the exercise of visitorial authority over operating subsidiaries of national banks. Likewise, 12 C.F.R. § 5.34 field-preempts California's licensing authority over such entities.[28] Section 501(a)(1) of the

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[28] Wells Fargo asserted in its briefs before this court that we need not reach its retaliation claim against the Commissioner if we conclude that the licensing requirements are preempted. Because we so conclude, we deem this argument abandoned.

DIDMCA, however, does not preempt California's per diem loan-interest statutes.

We therefore remand these appeals to the district court for modification of the permanent injunction entered against the Commissioner, and for further proceedings as necessary, consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.[29]

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[29] Each party shall bear its own costs on appeal. *See* Fed. R.App. P. 39(a)(4).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Filed May 7, 2004]

NO. CV S-03-0256 GEB JFM

QUICKEN LOANS, INC., a Michigan corporation,
Plaintiff,

v.

DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations,
Defendant.

ORDER

Plaintiff Quicken Loans, Inc. and Defendant Demetrios Boutris, in his official capacity as the Commissioner of the California Department of Corporations ("Commissioner"), have filed cross-motions for summary judgment on the remaining issue in this action: whether the Alternative Mortgage Transaction Parity Act of 1982 ("AMTPA") preempts application of a previously effective version of California's "per diem" statutes to alternative mortgage transactions ("AMTS") which were offered by Quicken Loans.[1]

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[1] The per diem statutes at issue prohibited lenders from charging interest on residential mortgages for a period in excess of one day prior to recordation of the mortgage or deed of trust. *See* Cal. Civ. Code § 2948.5 (1990) (amended 2001 and 2003); Cal. Fin. Code § 50204(o) (2000) (amended 2003). These statutes were amended in 2003 to provide that lenders may not charge interest on residential mortgages for "more than one day prior to the date that the loan proceeds are disbursed from escrow." Cal. Civ. Code § 2948.5; *see also* Cal. Fin. Code § 50204(o). Although this action regards application of the pre-amendment statutes, it is not moot because the amendments are not retroactive.

BACKGROUND

Quicken Loans is a Michigan corporation that engages in residential mortgage lending in each state of the United States. (Pl.'s Statement of Undisputed Facts ("Pl.'s Facts") ¶ 1; Def.'s Response to Pl.'s Facts ¶ 1.) Quicken Loans is authorized to make residential mortgage loans in California under the California Residential Mortgage Lending Act. (Pl.'s Facts ¶ 3; Def.'s Response to Pl.'s Facts ¶ 3.)

On March 11, 2002, the Commissioner sent to Quicken Loans a letter stating Quicken Loans had violated, and was continuing to violate, the per diem restrictions imposed by California Financial Code § 50204(o) and the version of California Civil Code § 2948.5 in effect prior to January 1, 2001 ("the per diem statutes"). (Pl.'s Facts ¶ 6; Def.'s Response to Pl.'s Facts ¶ 6.) The letter stated Quicken Loans had charged interest on mortgage loans in excess of one day "prior to recordation of the deed of trust," contrary to the requirements of the per diem statutes. (Pl.'s Facts ¶ 7; Def.'s Response to Pl.'s Facts ¶ 7.) Thereafter, in a letter dated January 28, 2003, the Commissioner ordered Quicken Loans to:

> (1) review all loans it made in California from a period beginning October 14, 1999; (2) refund interest payments collected in violation of the "per diem" restrictions (and pay the borrowers 10% interest on the refunded interest); and (3) submit a detailed report of all such loans. . . .

(Pl.'s Facts ¶ 8; Def.'s Response to Pl.'s Facts ¶ 8.)

Both Quicken Loans and the Commissioner seek declaratory judgment on whether the AMTPA preempts application of California's per diem statutes to the AMTs at issue. The AMPTA is a statute which grants state housing creditors a right to "parity with federally chartered institutions" by granting them the right to "make, purchase, and enforce

[AMTs] so long as the transactions are in conformity with the regulations issued by [specified] Federal agencies."[2] 12 U.S.C. § 3801(b). Quicken Loans also moves for an injunction which would permanently enjoin the Commissioner from applying the per diem statutes to the AMTs at issue.

DISCUSSION

There is no dispute that the two types of mortgage loans at issue, home equity lines of credit ("HELOCs") and "balloon loans," are AMTs governed by the AMTPA. *See* 12 U.S.C. § 3802(1). (Pl.'s Facts ¶¶ 9, 11-12; Def.'s Response to Pl.'s Facts ¶¶ 9, 11-12.) There is also no dispute that Quicken Loans's AMTs were issued in compliance with federal regulations: the Commissioner does not challenge Quicken Loans's showing that its balloon loans satisfied:all regulatory requirements, (Pl.'s Facts ¶ 14; Def.'s Response to Pl.'s Facts ¶ 14); nor does he challenge Quicken Loans's showing that its HELOCs satisfied the regulatory requirements in effect after July 1, 2003. (Pl.'s Facts ¶ 15; Def.'s Response to Pl.'s Facts ¶ 15.)[3]

The dispute here regards Quicken Loans's request for a finding that California's per diem statutes are preempted by AMTPA. The Commissioner responds that "California's per diem interest statutes are not preempted by the AMTPA [because] these statutes are not in conflict with or expressly preempted by the federal statute or the regulations promulgated by the Office of Thrift Supervision . . . pursuant to the AMTPA." (Def.'s Mot. at 6.)

"Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). "Pre-

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[2] Although the term "state housing creditor" will be used herein, some sources use the alternate term "nonfederally chartered housing creditors."

[3] Quicken Loans has abandoned its claims for relief with regard to HELOCs issued prior to July 1, 2003. (Pelto Decl. ¶ 12.)

emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982) (citation omitted). "[S]tate law is naturally preempted to the extent of any conflict with a federal statute" or regulation *Crosby*, 530 U.S. at 372; *see Fidelity Federal Sav. and Loan Ass'n*, 458 U.S. at 153 (holding federal regulations "have no less pre-emptive effect than federal statutes").

In the AMTPA, Congress expressly acknowledges that state laws and regulations are preempted to the extent necessary to allow state housing creditors to engage in AMTS "notwithstanding any State constitution, law, or regulation." 12 U.S.C. § 3803(c). But the AMTPA "itself does not define the scope of preemption." *Nat'l Home Equity Mortgage Ass'n v. Office of Thrift Supervision*, 271 F. Supp. 2d 264, 272 (D.D.C. 2003) ("*NHEMA*"). Instead, the scope of preemption is delineated by the Office of Thrift Supervision ("OTS"), which bears authority to "identify, describe, and publish those portions or provisions of [its] . . . regulations that are inappropriate for (and thus inapplicable to)" state housing creditors. Pub. L. 97-320 5 807(b) (Oct. 15, 1982); *see NHEMA*, 271 F. Supp. 2d at 272 (noting courts have "deferred to OTS' interpretation of the scope of AMTPA's preemption"); *see also Black v. Fin. Freedom Senior Funding Corp.*, 92 Cal. App. 4th 917, 931-32 (2002) ("[T]he preemption language of 12 U.S.C. section 3803(c) can certainly be interpreted as not extending to state laws that concern aspects of those transactions other than those addressed by the four applicable federal regulations."), *cited with approval in Ansley v. Ameriquest Mortgage Co.*, 340 F.3d 858, 863 (9th Cir. 2003).

Quicken Loans's preemption motion is based on two alternate arguments. It argues first that the OTS's regulations "preempt[] application of California's per diem statutes be-

cause [the per diem] statutes would violate 12 C.F.R. [§] 560.35, which the OTS has specifically extended to [state housing] creditors such as Quicken Loans."[4] (Pl.'s Mot. at 9.) Second, Quicken Loans argues the AMTPA's general statutory purpose of "parity" between state and federal housing creditors requires that the per diem statutes be preempted for state creditors because federal creditors are already held exempt. (*See* Pl.'s Mot. at 10.) The two arguments will be addressed in turn.

I. Preemption Due To Conflict With § 560.35

Quicken Loans contends California's per diem statutes are preempted because they violate the requirements of 12 C.F.R. § 560.35. (Pl.'s Mot. at 9.) Section 560.35 governs "adjustments to the interest rate, payment, balance, or term to maturity." 12 C.F.R. § 560.35(a). It provides, in pertinent part:

> [a]djustments to the payment and the loan balance that do not reflect an interest-rate adjustment may be made if:
>
> (1) The adjustments reflect a change in an index that may be used pursuant to paragraph (d) of this section;
>
> (2) In the case of a payment adjustment, the adjustment reflects a change in the loan balance or is made pursuant to a formula, or to a schedule specifying the percentage or dollar change in the payment as set forth in the loan contract; or
>
> (3) In the case of an open-end line-of-credit loan, the adjustment reflects an advance taken by the bor-

[4] In 1996, the OTS identified four regulations, including § 560.35, as "appropriate and applicable" to state housing creditors. *See* 61 Fed. Reg. 50951, 50983 (Sept. 30, 1996). It revised its regulations in 2002 to identify only 5 560.35 and one other regulation as "appropriate and applicable." 12 C.F.R. § 560.220.

> rower under the line-of-credit and is permitted by the loan contract.

12 C.F.R. § 560.35(c).

Quicken Loans contends California's per diem statutes conflict with § 560.35 because they "forc[e] Quicken Loans to make an adjustment in loan payment amounts based upon a factor not permitted by the regulation: the date of recording of the deed of trust." (Pl.'s Opp'n to Def.'s Mot. at 2.) Quicken Loans contends such payment adjustments are necessary because delays caused by escrow companies and County Recorders sometimes prevent Quicken Loans's deeds of trust from being recorded until days, weeks, or months after the loan funds were disbursed to the borrower. (McInnis Decl. ¶¶ 4-5.) "[T]o comply with the 'per diem' statutes," Quicken Loans states it "would have . . . to (1) track each loan individually to determine whether the deed of trust had been recorded; and (2) adjust the contractual loan payment amount to delete interest charges until the recording of the deed of trust." (*Id.*)

Nothing in § 560.35 indicates the "adjustments" which are governed by the terms of that section "include the refund of pre-recordation interest" discussed by Quicken Loans. (*See* Def.'s Reply in Support of Def.'s Mot. at 2.) If Quicken Loans had set its original loan payment terms to delay the accrual of interest until one day prior to recordation of the deed of trust, the changes it now characterizes as "adjustments" would have been unnecessary.[5] Since California's per

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[5] Quicken Loans admits that, in violation of the per diem requirements at issue, it "historically has instructed the escrow company to assess a borrower interest commencing the date the escrow company disburses the loan funds . . . regardless of delays in recording deeds of trust." (McInnis Decl. ¶ 6.) Although counsel for Quicken Loans indicated at oral argument that Quicken Loans would have had difficulty establishing loan payment terms which provided for interest to begin accruing upon recordation

diem statutes do not cause a violation of § 560.35, this argument fails to justify preemption.

II. Preemption To Achieve Parity

Quicken Loans also argues "preemption . . . is required to the extent necessary to achieve parity between state and federal lenders in their ability to offer alternative mortgages," regardless of whether a regulation identified by the OTS has been violated. (Pl.'s Opp'n to Def.'s Mot. at 3.) The Commissioner counters that "the OTS has identified only four regulations crucial for state housing creditors to obtain parity" and "[t]hese are the only regulations that could possibly preempt *conflicting* state law." (Def.'s Opp'n at 9.)

Quicken Loans concedes its argument—that preemption may extend beyond the identified OTS regulations—is in conflict with the holding in *NHEMA*, 271 F. Supp. 2d 264, where the judge found AMTPA preemption did not extend beyond OTS's identified regulations because a more extended preemption would "provide a substantial advantage to state housing creditors by freeing them from [both] federal [and] state supervision." *NHEMA*, 271 P. Supp. 2d at 271. (Pl.'s Mot. at 11-12.) The described advantage exists because federal thrifts and savings associations are subject to a "uniform federal scheme" governed by all of OTS's regulations, *see* 67 Fed. Reg. at 60544, while state housing creditors who chose to proceed under the AMTPA are not "under the supervision of the federal agencies," Sen. Rep. 97-463, at 55 (May 28, 1982), and are governed only by those OTS regulations designated as appropriate.

Quicken Loans argues *NHEMA* was "badly reasoned and wrongly decided" because the OTS's limited designation of regulations as appropriate for preemption "invert[ed]" the

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of the deed of trust, Quicken Loans has not made an adequate showing that such payment terms could not have been created.

language of Congress's grant of authority to the OTS, which only authorized the OTS to designate regulations as "inappropriate." (Pl.'s Mot. at 12.) In essence, Quicken Loans argues that the OTS's focus on "appropriate" regulations resulted in its designation of too many regulations as "inappropriate," such that preemption should now be extended to all regulations which the OTS improperly found "inappropriate." But Quicken Loans argues only in general terms, and does not identify which regulations currently designated as "inappropriate" should have a contrary designation. Neither does it demonstrate that such regulations could have resulted in the preemption of California's per diem statutes. Quicken Loans's conclusory arguments are insufficient to support a finding of preemption.[6]

Quicken Loans further contends that the AMTPA purpose of "parity" supports preemption here because federal housing creditors have already been held exempt from the per diem statutes. (*See* Pl.'s Mot. at 9-10.) But "absolute parity" between state and federal housing creditors is not required, *see Black*, 92 Cal. App. 4th at 931-32, and the per diem statutes are preempted for federal housing creditors in part because of a "clear congressional intent to delegate to the OTS complete authority to regulate federal savings and loan associations." *Washington Mut. Bank F.A. v. Superior Court*, 95 Cal. App. 4th 606, 618 (2002). The same intent is not evident for state housing creditors, who are largely regulated by state law. Quicken Loans has thus failed to make a showing that the per diem statutes are preempted by the AMTPA.

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[6] The cases cited by Quicken Loans, which contain broad language in support of preemption, are not on point. *See Illinois Ass'n of Mortgage Brokers v. Office of Banks and Real Estate*, 308 F.3d 762, 767-68 (7th Cir. 2002) (remanding for determination whether the OTS's designated regulations have sole preemptive force under AMTPA); *National Home Equity Mortgage Ass'n v. Face*, 239 F.3d 633, 635-36, 638 (4th Cir. 2001) (deciding preemption issue based on existence of a relevant OTS regulation).

For the foregoing reasons, Quicken Loans's motion for summary judgment is denied and the Commissioner's summary judgment motion is granted. The Clerk is instructed to enter judgment for the Commissioner on the AMTPA claims resolved herein, and for Quicken Loans on the DIDMCA claims resolved in the Order issued on May 8, 2003, and close the case.

IT IS SO ORDERED.

DATED: May 5, 2004

/s/ Garland E. Burrell, Jr.
Garland E. Burrell, Jr.
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Filed JUL 2, 2003]

NO. CV S-03-0256 GEB JFM

QUICKEN LOANS, INC., a Michigan corporation,
Plaintiff,

v.

DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations,
Defendant.

ORDER

Plaintiff Quicken Loans, Inc. ("Quicken Loans") moves for reconsideration of the May 8, 2003, Order which failed to reach its argument that the Alternative Mortgage Transaction Parity Act of 1982 ("Parity Act") preempts California's "per diem" statutes.[1] Quicken Loans also moves for partial summary judgment on its claim that Defendant Commissioner Boutris's interpretation and application of California's per diem statutes violate the Takings Clause of the United States Constitution. Defendant opposes the motions and moves for summary judgment of Quicken Loans's takings claim.

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[1] California's per diem statutes prohibit lenders from charging any interest on residential mortgages for a period in excess of one day prior to recordation of the mortgage or deed of trust. *See* Cal. Civ. Code § 2948.5; Cal. Fin. Code § 50204(o).

Background[2]

Quicken Loans is a Michigan corporation that engages in residential mortgage lending in all fifty states of the United States. (Pl.'s Statement of Undisputed Facts in Support of Mot. for Partial Summ. J.—Takings ("Pl.'s SUF") ¶ 1; Def.'s Response to Pl.'s SUF T ¶ 1.) Quicken Loans makes a variety of loans secured by residential mortgages, including home purchase money, refinancing and home equity residential loans. (*Id.* ¶ 2.) Quicken Loans is licensed and authorized to make residential mortgage loans in California under the California Residential Mortgage Lending Act ("CRMLA"). (*Id.* ¶ 3.) During 2001 and 2002, Quicken Loans contends it made approximately $500 million and $745 million respectively in loans secured by mortgages on California property. (Pl.'s SUF ¶ 4.) It further asserts it regularly makes alternative mortgage transactions, and has made in excess of 1800 of these loans since 1999 to the present. (Pl.'s Statement of Undisputed Facts in Support of its Mot. for Partial Summ. J.—Parity Act ¶ 5.)

Discussion[3]

Quicken Loans is correct in its position that the May 8 Order should have reached its Parity Act preemption argument. The May 8 Order held California's per diem statutes are preempted by the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"), which applies to "any loan, mortgage, credit sale, or advance which

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[2] The Commissioner denies many of the assertions of fact made by Quicken Loans on the basis that no discovery has been conducted; however, the Commissioner states he has "admitted sufficient facts upon which he believes this court may make a substantive ruling on the motion and . . . does not request a delay to conduct discovery prior to responding to the motion." (Def.'s Memo. of P. & A. in Opp'n to Mot. for Partial Summ. J.—Takings at 2.)

[3] Summary judgments standards are well-known and will not be repeated unless relevant to a point decided.

is . . . secured by a first lien on residential real property[,]. . . made after March 31, 1980; and [which is a federally related mortgage loan.]" 12 U.S.C. § 1735f-7a(a). In contrast, the Parity Act applies to "alternative mortgage transactions" which do not have to be first liens on residential property. Quicken Loans contends the Parity Act applies to its alternative mortgage transactions that are not first liens and that the Parity Act preempts the Commissioner's auditing authority over these transactions.

I. Parity Act Preemption

Quicken Loans argues California's per diem statutes are preempted by the Parity Act because they cannot be enforced against federally chartered lenders. The Commissioner counters that the per diem laws are not in conflict with or expressly preempted by federal statute or any regulation promulgated by the federal Office of the Thrift Supervision ("OTS") under the Parity Act.

The Parity Act "authorize[s] non-federally chartered housing creditors to offer alternative mortgages in accordance with the Federal regulations issued by the appropriate Federal regulatory agencies[, thereby allowing] . . . those creditors [to] have parity with federally chartered institutions.'" *Nat'l Home Equity Mortgage Ass'n v. Face*, 239 F.3d 633, 635 (4th Cir. 2001)(quoting Sen. Conf. Rep. No. 97-641, at 94 (1982), reprinted in 1982 U.S.C.C.A.N. 3128, 3137). According to 12 U.S.C. § 3803(a) of the Parity Act:

> In order to prevent discrimination against State-chartered depository institutions, and other nonfederally chartered housing creditors, with respect to making, purchasing, and enforcing alternative mortgage transactions, housing creditors may make, purchase, and enforce alternative mortgage transactions, except that this section shall apply . . . [and]

> (3) with respect to all other housing creditors, including without limitation, savings and loan associations, mutual savings banks, and savings banks, only to transactions made in accordance with regulations governing alternative mortgage transactions as issued by the Director of the Office of Thrift Supervision for federally chartered savings and loan associations, to the extent that such regulations are authorized by rulemaking authority granted to the Director of the Office of Thrift Supervision with regard to federally chartered savings and loan associations under laws other than this section.

Furthermore, "[a]n alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation." 12 U.S.C. § 3803(c). "An alternative mortgage is one which is not a traditional, fully amortized, fixed rate loan."[4] *Shinn v. Encore Mortgage Services, Inc.*, 96 F. Supp. 2d 419, 422 (D.N.J. 2000).

> The practical effect of the [Parity Act's] statutory scheme is to permit a non-federally chartered housing creditor to make a loan either under state law, in which case the

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[4] [T]he term "alternative mortgage transaction" means a loan or credit sale secured by an interest in residential real property, a dwelling, all stock allocated to a dwelling unit in a residential cooperative housing corporation, or a residential manufactured home (as that term is defined in section 5402(6) of Title 42)—(A) in which the interest rate or finance charge may be adjusted or renegotiated; (B) involving a fixed-rate, but which implicitly permits rate adjustments by having the debt mature at the end of an interval shorter than the term of the amortization schedule; or (C) involving any similar type of rate, method of determining return, term, repayment, or other variation not common to traditional fixed-rate, fixed-term transactions, including without limitation, transactions that involve the sharing of equity or appreciation; described and defined by applicable regulation.

12 U.S.C. § 3802(1).

> loan transaction remains subject to the full range of state regulations, or under federal law, in which case the loan transaction becomes subject to federal regulations governing similar loans by federally chartered lending institutions. Non-federally chartered housing creditors exercise this regulatory "option" by affirmatively complying with substantive federal regulations identified by the Office of Thrift Supervision.

Face, 239 F.3d at 635-36. Quicken Loans has provided no evidence that it complied with the substantive federal regulations identified by the OTS when engaging in the alternative mortgage transactions at issue. Therefore, Quicken Loans has failed to show that the Parity Act governs the loans at issue and its motion for partial summary judgment is denied.

II. Takings Clause

Both parties seek partial summary judgment of Quicken Loans's claim that the Commissioner's interpretation and application of California's per diem statutes constitute an unconstitutional regulatory taking under the Fifth Amendment. At the hearing on June 30, 2003, Quicken Loans clarified that neither its Complaint nor its regulatory taking motion asserts a facial challenge against the per diem statutes; rather it challenges the Commissioner's application of the statutes to the interest Quicken Loans seeks to earn on mortgage loans.[5]

Quicken Loans suggests that California's per diem statutes do not authorize the Commissioner to limit when interest accrues on mortgage loans to just one day prior to recording of the mortgage or deed of trust, and Quicken Loans explicitly argues that the Commissioner incorrectly interprets the term "recording" in the per diem statutes. The Commis-

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[5] Therefore Quicken Loans has withdrawn any facial challenge asserted in its Complaint.

sioner contends that "recording" occurs when the Recorder's office affixes the official seal on the mortgage or deed of trust, notwithstanding when the document is delivered to the Recorder's office. (Def.'s Response to Separate Statement of Undisputed Facts—Takings at ¶ 8.) Quicken Loans counters that California Civil Code section 1170 prescribes when recording occurs, and that under this section recording occurs upon delivery of the mortgage or deed of trust to the Recorder's office. Section 1170 provides, "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the Recorder's office, with the proper officer, for record."

To prevail on an as-applied challenge under the takings clause, Quicken Loans is required to establish that the Commissioner has (1) taken its property by application of the per diem statues in a manner that goes too far (2) without tendering just compensation for the taking. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1500 (9th Cir. 1990). "Both the taking element and the compensation element must be ripe before the claim is justiciable [in federal court]." *Id.* "[T]o assert an as-applied takings claim, [Quicken Loans] must establish two things: (1) the [Commissioner] has reached a final decision on the applicability of the [per diem statutes] to [Quicken Loans's] property; and (2) [Quicken Loans] is unable to receive just compensation from [California]." *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998). The ripeness doctrine "prevents 'the courts . . . from entangling themselves in abstract disagreements over administrative policies, and also . . . protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties.'" *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 850 (9th Cir. 2001) (citation omitted).

California Finance Code sections 50321 and 50323 set forth the procedural requirements that must be met before an order issued by the Commissioner becomes final. Section 50321 reveals if the Commissioner "has reasonable grounds to believe that any [mortgage lender] licensee has violated . . . any law or rule binding upon it, the [C]ommissioner shall, by written order addressed to the licensee, direct the discontinuance of the violation." Cal. Fin. Code § 50321. However, no such order "may become final except after notice to the affected licensee of the [C]ommissioner's intention to make the order final and of the reasons for the finding." *Id.* § 50323. Section 50323 further prescribes:

> The [C]ommissioner shall also notify the licensee that upon receiving a request the matter will be set for hearing to commence within 15 business days after receipt. The licensee may consent to have the hearing commence at a later date. If no hearing is requested within 30 days after the mailing or service of the required notice, and none is ordered by the [C]ommissioner, the order may become final without hearing and the licensee shall immediately discontinue the practices named in the order.

Id.

In the present action, neither party has established that the Commissioner has issued a final order on the application of California's per diem statutes to Quicken Loans. Instead the parties rely on a letter dated March 11, 2002, in which the Commissioner identified five loans disclosing that Quicken Loans overcharged per diem interest and the Commissioner further expressed concern that "it appears that there may be other loans with the same problem." (Request for Judicial Notice in Support of Pl.'s Mot. for Partial Summ. J.—Takings Ex. B at Ex. A.) This letter has not been shown to

constitute the Commissioner's final decision under California Financial Code section 50323.[6]

Notwithstanding the parties' failure to show that the Commissioner has taken final action as required by Section 50323, the parties argued at the June 30 hearing that this case is ripe because the Commissioner has expressed his final decision on the application of the per diem statutes to Quicken Loans. They also argued at that hearing that the exact amount of property involved in the alleged taking is immaterial because the "taking" focus should be on the Commissioner's interpretation and application of the per diem statutes to Quicken Loans's property. This argument is premised on the existence of a property interest, even though that interest has not yet been established, and even assuming its existence, its precise value is presently unknown. Further, the parties' respective arguments about when "recording" occurs under the per diem statutes, considered in the context of the as-applied takings challenge, indicate they could be inviting the federal court to become entangled in an abstract disagreement. This is because should recordation under each party's interpretation occur at the same time, resolving their dispute on when "recording" occurred would decide an issue that is immaterial to Quicken Loans's as-applied takings claim.

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[6] Quicken Loans also submitted a letter which it received from the Commissioner, dated January 28, 2003, in which the Commissioner rejected arguments made by Quicken Loans in a June 11, 2002, letter. (Request for Judicial Notice in Support of Pl.'s Mot. for Partial Summ. J.—Takings Ex. B at Ex. B.) The Commissioner's January 28 letter ends by requesting Quicken Loans, "within 14 days of the date of [the] letter [to] submit Quicken's plan to complete review and a proposed date for completion of this review and the date for submission of the report of the review." (*Id.* Ex. B. at Ex. B at 1.) Neither the Commissioner's March 11 nor January 28 letters show that the Commissioner has taken final action required under Section 50323.

Not only do the parties appear to invite resolution of an issue of past events where there is no certainty that judicial decision makes a difference to the as-applied takings claim, Quicken Loans has failed to satisfy the second ripeness requirement obligating it to seek just compensation from the state.

> The Fifth and Fourteenth Amendments do not prohibit the taking of property; they prohibit the taking of property without just compensation. Therefore, there is no constitutional injury until the plaintiff has availed himself of the state's procedures for obtaining compensation for the injury, and been denied compensation.

San Remo Hotel, 145 F.3d at 1102. "Ordinarily, a plaintiff must seek compensation through state inverse condemnation proceedings before initiating a takings suit in federal court, unless the State does not provide adequate remedies for obtaining compensation." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 n.8 (1997). Quicken Loans has failed to show that California does not provide adequate remedies for obtaining compensation for the alleged taking by the Commissioner. *See Massingill v. Department of Food & Agriculture*, 102 Cal. App. 4th 498, 506 (2002) ("property owner may bring an inverse condemnation action and, if successful, the regulatory agency must either withdraw the regulation or pay just compensation").

Because the parties have failed to establish that the as-applied takings claim is ripe, both parties' motions are denied. Since Quicken Loans's as-applied takings claim is unripe, it is dismissed.

IT IS SO ORDERED.

DATED: July 2, 2003

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Filed May 8, 2003]

NO. CV s-03-0256 GEB JFM

QUICKEN LOANS, INC., a Michigan corporation,
Plaintiff,

v.

DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations,
Defendant.

ORDER

Plaintiff Quicken Loans, Inc. ("Quicken Loans") moves for partial summary judgment and a permanent injunction which would enjoin Defendant Demetrios Boutris, in his official capacity as the Commissioner of the California Department of Corporations ("Commissioner"), and any other agent of the state of California, from enforcing the "per diem" interest restrictions found in the current and previous version of California Civil Code § 2948.5 and California Financial Code § 50205(o),[1] as to residential mortgage loans made by Quicken Loans that either qualify under the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"), or are made pursuant to the Alternative Mortgage Transaction Parity Act of 1982 ("Parity Act"), or

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[1] California's per diem statutes prohibit mortgage lenders from charging any interest on residential first mortgages for a period in excess of one day prior to recordation of the mortgage or deed of trust. *See* Cal. Civ. Code § 2948.5; Cal. Fin. Code § 50205(o).

are covered by both statutes. The Commissioner opposes the motion. The motion was argued May 5, 2003.

Background[2]

Quicken Loans is a Michigan corporation that engages in residential mortgage lending in the fifty states of the United States and the District of Columbia. (Pl.'s Statement of Undisputed Facts ("Pl.'s SUF") ¶ 1; Def.'s Response to Pl.'s SUF ("Def.'s Response") ¶ 1.) Quicken Loans makes a variety of loans secured by residential mortgages, including home purchase money, refinancing and home equity residential loans. (*Id.*) Quicken Loans is licensed and authorized to make residential mortgage loans in California under the California Residential Mortgage Lending Act ("CRMLA"). (*Id.* ¶ 2.) During 2001 and 2002, Quicken Loans contends it made approximately $500 million and $745 million respectively in loans secured by mortgages on California property. (*Id.* ¶ 1.)

On March 11, 2002, the Commissioner delivered a letter to Quicken Loans in which he stated Quicken Loans had violated and was continuing to violate the "per diem" restrictions imposed by California Civil Code 5 2948.5 that was in effect until January 1, 2001 and California Financial Code § 50204(o). (*Id.* ¶ 11.) In a letter dated January 28, 2003, the Commissioner ordered Quicken Loans to "(1) review all loans it made in California from a period beginning October 14, 1999; (2) refund interest payments collected in violation of the 'per diem' restrictions (and pay borrowers 10% interest on the refunded interest); and (3) submit a detailed report of

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[2] The Commissioner denies many of the assertions of fact made by Plaintiffs on the basis that no discovery has been conducted; however, the Commissioner states he has "admitted sufficient facts upon which he believes this court may make a substantive ruling on the motion and therefore does not request delay to conduct discovery prior to responding to the motion." (Def.'s Memo. of P. & A. in Opp'n ("Def.'s Opp'n") at 1.)

all such loans . . . ." *(Id.* ¶ 12.) The Commissioner also ordered Quicken Loans to comply with California Financial Code § 50204(o). (*Id.*) Quicken Loans estimates that conducting the review and completing the report would require it to review approximately 5,500 files at a cost of approximately $400,000. (Pl.'s SUF ¶ 14.)

Permanent Injunction Standards

"The requirements for the issuance of a permanent injunction are the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law." *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1495 (9th Cir. 1996). "[To] meet this standard, [Quicken Loans] must establish actual success on the merits, and that the balance of equities favors injunctive relief." *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998). Where an injunction is sought against an agency of state government, the injunction must be scrutinized closely "to make sure that the remedy protects the plaintiff['s] federal constitutional and statutory rights but does not require more of state officials than is necessary to assure their compliance with federal law." *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir.1995). "This requires both that there be a determination that the conduct of the [Commissioner] violates federal constitutional law. . . and that the scope of the injunction is no broader than necessary to provide complete relief to the named plaintiff[]. . . ." *Easyriders Freedom F.I.G.H.T.*, 92 F.3d at 1496.

Discussion[3]

Quicken Loans argues that California's "per diem" statutes are preempted by DIDMCA and therefore cannot be enforced against it. "Preemption may be either express or implied, and 'is compelled whether Congress' command is explicitly

[3] Summary judgment standards are well known and will not be repeated unless relevant to a point decided.

stated in the statute's language or implicitly contained in its structure and purpose.'" *Fidelity Federal Savings and Loan Ass'n v. Cues...*, 458 U.S. 141, 152-53 (1982) (citation omitted).

> [When] explicit pre-emption language does not appear, or does not directly answer the question . . . courts must consider whether the federal statute's structure and purpose or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. . . . A federal statute, for example, may create a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Alternatively, federal law may be in irreconcilable conflict with state law. . . . Compliance with both statutes, for example, may be a physical impossibility, . . . ; or, the state law may stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 31 (1996) (quotations and citations omitted).

> Under DIDMCA,
>
> The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is—
>
> (A) secured by a first lien on residential real property. . .
>
> (B) made after March 31, 1980; and
>
> (C) [a 'federally related mortgage loan"]

12 U.S.C. § 1735f-7a(a). A "federally related mortgage" "(1) is secured by residential real property designed principally for the occupancy of from one to four families; and (2). . . (D) is

made in whole or in part by any 'creditor,' as defined in section 1602(f) of Title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year." 12 U.S.C. § 1725f-5(b). A "creditor" is:

> a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.

15 U.S.C. § 1602(f). The undisputed facts establish that the Quicken Loans residential loan transactions at issue in this action are subject to DIDMCA. States were able to override the DIDMCA's express preemption by explicitly opting out of its terms prior to April 1, 1983. *Id.* § 1735f-7a(b)(2). No evidence has been submitted demonstrating that California opted out of the DIDMCA's express preemption.

California's per diem statutes prohibit interest from being charged on loaned mortgage funds for a period in excess of one day prior to recording of the mortgage. Cal. Civ. Code § 2948.5; Cal. Fin. Code § 50204(o). The per diem statute that was applicable to Quicken Loans until January 1, 2001, which was an earlier version of California Civil Code § 2948.5, provided in relevant part:

> interest on the principal obligation of a promissory note secured by a mortgage or deed of trust on real property improved with one-to-four residential dwelling units shall not commence to accrue prior to close of escrow, the date upon which the loan proceeds have been made available for withdrawal as a matter of right, as specified

in subdivision (d) of Section 12413.1 of the Insurance Code.

The current version of California Civil Code § 2948.5 provides, "[a] borrower shall not be required to pay interest on a principal obligation under a promissory note secured by a mortgage or deed of trust on real property improved with between one to four residential dwelling units for a period in excess of one day prior to recording of the mortgage or deed of trust if the loan proceeds are paid into escrow. . . ." In addition, under the CRMLA, a licensee may not "[r]equire a borrower to pay interest on the mortgage loan for a period in excess of one day prior to recording of the mortgage or deed of trust," except under certain circumstances which are not relevant to the present motion. Cal. Fin. Code § 50204(o).

Quicken Loans argues that California's per diem statutes expressly limit the amount of interest that a lender may collect on federally related mortgage loans and are therefore preempted by DIDMCA. (Pl.'s Memo. of P. & A. at 10.) Quicken Loans supports its position by relying primarily on *Shelton v. Mutual Savings and Loan Ass'n*, 738 F. Supp. 1050 (E.D. Mich. 1990). In *Shelton*, the plaintiffs argued defendant Bank "violated the Michigan usury statute, M.C.L. sections 438.31c(2) and (9), by charging interest before the loan proceeds were disbursed." *Id.* at 1053. The court explained, "the broadest possible interpretation of the exemption from state usury laws is consistent with the legislative purpose [of DIDMCA]," and therefore held Michigan's usury law was preempted by DIDMCA. *Id.* at 1057-58.

The Commissioner argues that the per diem statutes are not usury statutes[4] and "do[] absolutely nothing to frustrate the broad goals of DIDMCA[,] . . . [do] not limit the rate of interest plaintiff can charge[,] . . . [and do] not limit the total

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[4] California's usury laws are found in California Constitution. Article XV, § 1.

amount of interest plaintiff can collect, as the rate of interest charged remains within the control of the plaintiff and may be bargained with the consumer." (Def.'s Opp'n at 4.) Quicken Loans counters that DIDMCA is not limited to preempting only state usury statutes. (Pl.'s Reply at 4.) Quicken Loans contends, "if Congress had wished to limit the effect of DIDMCA solely to usury statutes, Congress would have done so explicitly." (*Id.* at 5.)

DIDMCA preempts "[t]he provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved. . ." on particular types of loans. 12 U.S.C. § 1735f-7a(a). The language of the statute does not expressly limit the preemptive scope of DIDMCA to state usury laws. However, the relevant legislative history makes clear that Congress just intended to create a limited preemption of state usury laws. *See Brown v. Investors Mortgage Co.*, 121 F.3d 472, 476 (9th Cir. 1997) ("Congress made specific findings that modification of state usury laws was necessary for a stable national financial system."). The Senate Report that accompanied the bill containing what became 12 U.S.C. § 1735f-7a provides:

> In order to ease the severity of the mortgage credit crunches of recent years and to provide financial institutions, particularly those with large mortgage portfolios, with the ability to offer higher interest rates on savings deposits, H.R. 4986 as reported by the Committee would preempt any state constitutional or statutory provision setting a limit on mortgage interest rates. . . .
>
> H.R. 4986 as amended provides for a limited preemption of state usury laws. It provides that the state constitutional or statutory restrictions on the amount of interest, discount points or other charges on any loan, mortgage or advance secured by real estate which is described in

> section 527(B) of the National Housing Act are exempt from usury ceilings. . . .
>
> The Committee believes that this limited modification in state usury laws will enhance the stability and viability of our nation's financial system and is needed to facilitate a national housing policy and the functioning of a national secondary market in mortgage lending. . .
>
> In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charges, attorney fees, late charges or similar limitations designed to protect borrowers.

S. Rep. No. 96-368, at 18-19 (1979), *reprinted in*, 1980 U.S.C.C.A.N. 236, 254-55.

"Usury is the receiving, securing, or taking of a greater sum or value for the loan or forbearance of money, goods, or things in action than is allowed by law, the exaction of a greater sum for the use of money than the highest rate of interest allowed by law." 45 Laura Dietz & Anne M. Payne, *American Jurisprudence, Interest and Usury* § 2 (2d ed. 2002). In California, "usury" has been defined as "taking more than the law allows upon a loan or for forbearance of a debt." *Hall v. Beneficial Fin. Co.*, 118 Cal. App. 3d 652, 654 (1981) (citation omitted). By prohibiting lenders from commencing to charge interest on loaned mortgage funds until one day prior to recordation, California's per diem statutes constitute usury laws.

The Commissioner also argues that California's per diem statutes do not fall within the type of activities preempted by DIDMCA because they do not expressly limit interest rates or amounts. The Commissioner compares California's per diem statutes with the simple interest statute ("SIS") held not preempted by the *DIDMCA in Grunbeck v. Dime Savings*

Bank of New York, 74 F.3d 331 (1st Cir. 1996). The SIS requires that any interest rate or amount agreed to by the parties be computed on a "simple interest" basis. *Grunbeck*, 74 F.3d at 337. The court explained,

> [t]he SIS . . . does not "serve to . . . restrain" either the rate or the amount of simple interest which may be obtained, since the lender remains free to compensate by increasing the simple interest rate. Thus, the SIS does not "expressly" limit "the rate or amount of interest." Nor, in the alternative, does the SIS—as distinguished from market forces—"limit" the rate or amount of interest if "limit" means a "final, utmost or furthest boundary" on the rate or amount of interest, since the SIS imposes no ceiling whatsoever on either the rate or amount of simple interest that may be exacted.

Id. at 338 n.6. The Commissioner argues that like the SIS, the per diem statutes "do not expressly limit interest rates or amount. . . [instead they] establish[] the date upon which the per diem interest may be assessed upon a borrower." (Def.'s Opp'n at 3.)

Quicken Loans counters that *Grunbeck* is factually distinguishable. Unlike the SIS, California's per diem restriction does not leave "entirely to the parties the rate and amount of . . . interest to be exacted" because once the lender and borrower's loan transaction is finalized, the lender has no way of collecting interest on loaned mortgage funds that would have been collected absent delays in recording the deed of trust. *Grunbeck*, 74 F.3d at 337. Quicken Loans is unable to bargain for a higher interest rate to compensate it for the possible delay in recordation of the mortgage or deed of trust because such delay is typically caused by the actions of others: the settlement agents, the escrow company, and the county clerk who records the mortgage. Thus, the statute in *Grunbeck* simply limited the manner in which the lender expressed its interest rate without limiting the total amount

of interest charged over the course of the loan. In contrast, California's per diem statutes prevent the lender from charging a specific pre-determined amount of interest over the course of the loan by tying the total amount of interest charged to events outside the lender's control which will not occur until after the loan is made.

DIDMCA preempts only those state laws "expressly limiting the rate or amount of interest . . ." charged on particular residential mortgage loans. 12 U.S.C. § 1735f-7a(a). "When engaged in the task of statutory interpretation, 'courts . . . should . . . attempt to give meaning to each word and phrase.'" *Grunbeck*, 74 F.3d at 338 (citation omitted). Thus, the question is whether the per diem statutes expressly place a ceiling on interest rates or amounts.[5] California's per diem statutes establish when interest can be charged by prohibiting a lender from charging interest on a mortgage for a period in excess of one day prior to recordation of the mortgage. Cal. Civ. Code § 2948.5; Cal. Fin. Code § 50204(o). By restricting the time period in which a lender may charge interest on loaned funds, the language of the per diem statutes "expressly limit[s] the rate or amount of interest. . . which may be charged . . . ." Therefore, DIDMCA preempts California's per diem statutes. Because Quicken Loans has demonstrated that it is entitled to judgment as a matter of law, this aspect of the motion for partial summary judgment is granted.[6]

Irreparable Harm and Inadequate Remedy at Law

Although Quicken Loans has established actual success on the merits of its DIDMCA preemption claim, it must show

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[5] The Commissioner also argues that the per diem interest limitation is permitted under the DIDMCA's exception for "other charges," but it is pellucid that the per diem statutes cover interest, not other charges.

[6] It is unnecessary to reach Plaintiff's preemption arguments based on the Parity Act in light of this ruling on DISMCA's preemption of California's per diem statutes.

"the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law." *Easyriders Freedom F.I.G.H.T.*, 92 F.3d at 1495. Quicken Loans has presented no evidence that the Commissioner will seek to enforce the per diem statutes against it in the face of the preemption ruling. Therefore, the motion for a permanent injunction is denied.

Conclusion

Quicken Loans is granted partial summary judgment on its claim that DIDMCA preempts the current and previous versions of California Civil Code 2948.5 and California Financial Code § 50205(o) as applied to those Quicken Loans residential mortgage loans that qualify under DIDMCA. The motion for a permanent injunction is denied.

IT IS SO ORDERED.

DATED: May 8, 2003

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
E.D. CALIFORNIA

No. CIV.S-03-0157 GEB JF

WELLS FARGO BANK, N.A., and
WELLS FARGO HOME MORTGAGE, INC.,
Plaintiffs,

v.

DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations,
Defendant.

May 9, 2003

ORDER

BURRELL, *District Judge*.

Pending are cross-motions for summary judgment involving all claims in this action. This dispute concerns preemption under the National Bank Act ("the Act") of California's power to regulate an operating subsidiary of a national bank; whether a California official is liable for retaliation and 42 U.S.C. § 1983 claims for his exercise of state regulatory authority over that operating subsidiary; and, whether the Depository Institutions Deregulation Monetary Control Act of 1980 ("DIDMCA") preempts California's per diem interest statutes.[1]

[1] California's per diem statutes prohibit mortgage lenders from charging any interest on residential mortgages for a period in excess of one day prior to recordation of the mortgage or deed of trust. *See* Cal. Fin.Code § 50204(*o*); Cal. Civ.Code § 2948.5.

Plaintiffs Wells Fargo Bank, N.A. ("Wells Fargo") and Wells Fargo Home Mortgage, Inc. ("WFHMI") move for summary judgment and a permanent injunction. Plaintiffs seek to permanently enjoin Defendant Demetrios Boutris, in his official capacity as the Commissioner of the California Department of Corporations ("Commissioner"), and his agents, "from exercising visitorial powers over Plaintiffs, or from otherwise preventing or interfering with WFHMI's operations in California." (Pls.' Memo. of P. & A. in Support of Mot. for Summ. J. ("Pls.' Memo.") at 3.) The Office of the Comptroller of Currency ("OCC") participated as *amicus curiae* in this case. The Commissioner opposes the motion and moves for summary judgment on all claims or in the alternative for partial summary judgment. (Def.'s Memo. of P. & A. in Support of Mot. for Summ. J. ("Def's Memo.") at 1.) The Commissioner also argues that Wells Fargo lacks standing since he is not seeking to exercise his regulatory authority over Wells Fargo. Wells Fargo rejoins it has standing because it makes residential mortgage loans through its operating subsidiary WFHMI and thus has sufficient interest in this action. Wells Fargo has standing.

The motions were argued May 5, 2003.

BACKGROUND

Wells Fargo is a federally chartered national banking association that is organized and exists under the National Bank Act, 12 U.S.C. § 21 *et seq.* (Pls.' Statement of Undisputed Facts ("Pls.' SUF") ¶ 1.) WFHMI is a state-chartered corporation, which is a wholly owned operating subsidiary of Wells Fargo. (*Id.* ¶ 2; Def.'s Statement of Undisputed Facts ("Def.'s SUF") ¶ 3.) WFHMI makes more than $1 million in first-lien residential mortgage loans in California per year. (Pls.' SUF ¶¶ 3,5.) Since 1996 until sometime in 2003 WFHMI held licenses to engage in real estate lending activities under the California Residential Mortgage Lending

Act ("CRMLA") and the California Finance Lenders Law ("CFLL").[2] (Def.'s SUF ¶ 5.)

The Commissioner is charged with enforcing the CRMLA, the CFLL, and *California Financial Code* § 50204(*o*) (a per diem statute) against CRMLA licensees. (*Id.* ¶ 6.) The Commissioner asserted regulatory, supervisory, examination and enforcement authority over WFHMI since it was a licensee under both the CRMLA and CFLL. (*Id.*) In August 2001 and at subsequent times, the Commissioner instituted regulatory examinations of WFHMI under the CFLL. (*Id.* ¶ 17; Pls.' Response to Def.'s SUF ¶ 17.)

On or about December 4, 2002, the Commissioner demanded that WFHMI conduct an audit of its residential mortgage loans made in California during 2001 and 2002. (Def.'s SUF ¶ 18.) The purpose of the audit was to identify all loans where WFHMI charged per diem interest in violation of *California Financial Code* § 50204(o), so that WFHMI could make appropriate refunds, and identify instances of understating finance charges in violation of the federal Truth in Lending Act. (*Id.*) WFHMI objected to the Commissioner's request in a letter dated January 22, 2003, in which it asserted because it is an operating subsidiary of a national bank it is subject to the OCC's exclusive regulatory authority. (*Id.* ¶ 20.)

Subsequently, on January 27, 2003, Plaintiffs filed this federal lawsuit against the Commissioner. The Commissioner instituted administrative proceedings to revoke WFHMI's licenses under CRMLA and CFLL on February 4, 2003. (*Id.* ¶ 23.) Plaintiffs unsuccessfully sought to enjoin those revocation proceedings.[3] Plaintiffs prevailed on the portion of

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[2] At the May 5 hearing, Plaintiffs' counsel stated that subsequent to the March 10, 2003, preliminary injunction hearing in this action the Commissioner revoked WFHMI's CRMLA and CFLL licenses.

[3] This portion of Plaintiffs' preliminary injunction motion was denied because Plaintiffs' argument that WFHMI was entitled to keep its Cali-

their preliminary injunction motion which sought to enjoin the Commissioner from exercising visitorial powers over Plaintiffs or from otherwise preventing WFHMI from conducting mortgage lending business in California.

DISCUSSION[4]

I. *Federal Preemption of the Commissioner's Exercise of Visitorial Powers over WFHMI*

At the May 5 hearing the Commissioner argued that notwithstanding his revocation of WFHMI's California licenses for its mortgage lending business in California, he still is authorized to exercise visitorial powers over WFHMI. Wells Fargo counters since the OCC is exercising federal visitorial powers over its operating subsidiary WFHMI, the Commissioner is preempted from exercising the same regulatory authority over WFHMI. (Pls.' Memo. at 3.) The OCC agrees with Plaintiffs' position, stating that "in its capacity as administrator of the national banking system . . . [and] pursuant to 12 U.S.C. § 484 and federal regulations, the OCC has exclusive 'visitorial' power over national banks and their operating subsidiaries except where federal law specifically provides otherwise."[5] (OCC Amicus Br. at 2.) The OCC has

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fornia mortgage lending licenses even though WFHMI had not complied with its licensing requirements and asserted those licenses were unnecessary for it to conduct its mortgage lending business in California was found unpersuasive.

[4] Summary judgment standards are well-known and will not be repeated unless relevant to a point decided.

[5] "[T]he term 'visitorial' powers as used in section 484 generally refers to the power of the OCC to 'visit' a national bank to examine its activities and its observance of applicable laws, and encompasses any examination of a national bank's records relative to the conduct of its banking business as well as any enforcement action that may be undertaken for violations of law." (OCC Amicus Br. at 2-3.)

The term "visitorial" power [in section 484] has deep historical roots. "At common law the right of visitation was exercised by the King as to

promulgated 12 C.F.R. § 7.4006, which concerns its exclusive visitorial powers over national banks. Section 7.4006 provides, in pertinent part: "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Section 7.4006 considers an operating subsidiary of a national bank to be an "instrumentalit[y] of the federal government . . . subject to the paramount authority of the United States." *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 561 (9th Cir.2002).

The Commissioner argues nothing in the Act empowered the OCC to issue § 7.4006. (Def.'s Opp'n to Pls.' Mot. for Summ. J. ("Def.'s Opp'n") at 3.) The OCC counters Congress implicitly authorized it to promulgate this regulation in the incidental powers section of 12 U.S.C. § 24 (Seventh), the visitorial powers section in 12 U.S.C. § 484, and through acknowledgment in the Gramm-Leach-Bliley Act ("GLBA") that national banks can have operating subsidiaries. The OCC contends § 7.4006 preempts the Commissioner's authority to exercise visitorial powers over WFHMI.

Whether OCC's promulgation of § 7.4006 is within the sphere of authority delegated to it by Congress depends on Congressional intent gleaned from the Act. "Preemption may be either express or implied, and 'is compelled whether

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civil corporations, ..." One of the earliest interpretations of the OCC's "visitorial power" within the context of . . . the predecessor [statute] to the current section 484, stated:

> "Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting its business, and enforce an observance of its laws and regulations . . . . [T]he word ['visitation' has been defined] to mean 'inspection; superintendence; direction; regulation.' "

First Union Nat'l Bank v. Burke, 48 F.Supp.2d 132, 144 (D.Conn.1999) (internal citations omitted).

Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982) (citation omitted).

> [When] explicit pre-emption language does not appear, or does not directly answer the question . . . courts must consider whether the federal statute's "structure and purpose" or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. . . . A federal statute, for example, may create a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." . . . Alternatively, federal law may be in "irreconcilable conflict" with state law. . . . Compliance with both statutes, for example, may be a "physical impossibility," . . . ; or, the state law may "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996) (citations omitted). "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Savings and Loan Ass'n*, 458 U.S. at 153-54, 102 S.Ct. 3014.

A. *National Bank Act*

National banks are created and governed by the National Bank Act. The Act was enacted to "facilitate . . . 'a national banking system,'" *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978)(quoting Cong. Globe, 38th Cong., 1st Sess., 1451 (1864)), and "to protect national banks against intrusive regulation by the States." *Bank of America*, 309 F.3d at 561. "The National Bank Act (12 U.S.C. § 21 et seq.) constitutes by itself a complete system for the estab-

lishment and government of national banks." *Deitrick v. Greaney*, 309 U.S. 190, 194, 60 S.Ct. 480, 84 L.Ed. 694 (1940) (quotations and citations omitted). The Act provides national banks shall have power

> [t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes. . . .

12 U.S.C. § 24 (Seventh). The OCC is the administrator charged with supervision of the Act and bears "primary responsibility for surveillance of 'the business of banking' authorized by § 24 (Seventh)."[6] *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995); *see* 12 U.S.C. §§ 1, 26-27, 481. The Act prescribes: "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress. . . ." 12 U.S.C. § 484(a).

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[6] The Act authorizes the OCC to "appoint examiners who shall examine every national bank as often as the Comptroller of the Currency shall deem necessary. The examiner making the examination of any national bank shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency. . . ." 12 U.S.C. § 481. "The provisions of the Act requiring periodic examinations and reports and the powers of the Comptroller are designed to insure prompt discovery of violations of the Act and in that event prompt remedial action by the Comptroller." *Deitrick*, 309 U.S. at 195, 60 S.Ct. 480.

The Commissioner concedes the OCC's exclusive visitorial power over national banks, but insists that regulatory authority does not extend to WFHMI. The Commissioner asserts nothing in the Act authorizes the OCC to prescribe it has exclusive visitorial authority over operating subsidiaries of national banks. (Def.'s Opp'n at 3.) He argues since an operating subsidiary is not a national bank, it should not be granted all the rights and privileges of a national bank. (Def.'s Memo. at 7.) Plaintiffs counter "that operating subsidiaries conduct only activities that the national bank is authorized to conduct, and therefore function as separately incorporated divisions or departments of the national bank . . . ." (Pls.' Memo. at 7.) The OCC agrees with Plaintiffs stating, "When established in accordance with the procedures mandated by the OCC Operating Subsidiary Rule and approved by the OCC, the operating subsidiary is a federally-authorized means by which a national bank may conduct federally-authorized activities." (OCC Amicus Br. at 13.)

B. *Operating Subsidiaries*

The OCC asserts that "[p]ursuant to [national banks'] authority under 12 U.S.C. § 24 (Seventh) to exercise 'all such incidental powers as shall be necessary to carry on the business of banking,' national banks have long used separately incorporated entities to engage in activities that the bank itself is authorized to conduct." (*Id.* at 11-12.) "Incidental powers [in § 24 (Seventh)] include activities that are 'convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act.'" *Bank of America*, 309 F.3d at 562 (citations omitted). The United States Supreme Court held that the "'business of banking' is not limited to the enumerated powers in § 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated. The exercise of the Comptroller's discretion, however, must be kept within reasonable bounds."

NationsBank of North Carolina, N.A., 513 U.S. at 258, 115 S.Ct. 810 n. 2.

The OCC has promulgated an operating subsidiary rule in 12 C.F.R. § 5.34, which prescribes: "[a] national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC, or otherwise under other statutory authority. . . ." Section 5.34(e)(3) provides: "[a]n operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank."[7]

At the May 5 hearing, the Commissioner virtually conceded the OCC's construction of 12 U.S.C. § 24 (Seventh) as authorizing national banks to conduct the business of banking through operating subsidiaries is entitled to deference by stating this construction is "probably" reasonable in light of *NationsBank of North Carolina, N.A.*, 513 U.S. at 258 n. 2, 115 S.Ct. 810. (Reporter's Transcript ("RT") at 30.) However, the Commissioner insisted that this statute does not authorize the OCC to exercise exclusive visitorial powers over operating subsidiary entities. The Commissioner's equivocal position on whether the OCC can authorize national banks to conduct banking business through operating subsidiaries requires the issue to be decided.

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[7] Before a national bank can be authorized to conduct permissible banking activities through an operating subsidiary, the bank must comply with the OCC's licensing requirements. Under 12 C.F.R. § 5.34(b), "A national bank must file a notice or application as prescribed in this section to acquire or establish an operating subsidiary, or to commence a new activity in an existing operating subsidiary." "The OCC reviews a national bank's application to determine whether the proposed activities are legally permissible and to ensure that the proposal is consistent with safe and sound banking practices and OCC policy and does not endanger the safety or soundness of the parent national bank." *Id.* § 5.34(e)(5)(iii).

Both parties cite to the GLBA's definition of "financial subsidiary" as support for their respective positions on whether the Act empowers a national bank to conduct banking business through an operating subsidiary. Plaintiffs and the OCC argue Congress acknowledged national banks' authority to conduct banking business in this manner in the GLBA's definition of "financial subsidiary." The Commissioner counters that definition evinces Congress never intended national banks to conduct business through operating subsidiaries.

The Commissioner's reliance on this definition is misplaced. The "financial subsidiary" definition recognizes that "operating subsidiaries" could exist by stating a "'financial subsidiary' . . . is . . . other than a subsidiary that . . . engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. § 24a(g)(3). Not only does this language reference operating subsidiaries, it indicates the OCC exercises visitorial authority over them. A Senate Report explaining the scope and purpose of the GLBA explicitly addresses the use of operating subsidiaries by national banks:

> For at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national banks may engage in directly. For example, national banks are authorized directly to make mortgage loans and engage in related mortgage banking activities. Many banks choose to conduct these activities through subsidiary corporations. Nothing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations, or to invest in joint ventures to engage in bank permissible activities with other banks or nonbank companies.

S.Rep. No. 106-44, at 8 (1999).[8]

Moreover, court decisions determining whether a particular activity is permissible for a national bank have treated the activities of an operating subsidiary as being equivalent to the activities of the national bank. *See NationsBank of North Carolina, N.A.*, 513 U.S. at 254, 115 S.Ct. 810 (brokerage subsidiary acting as an agent in the sale of annuities); *Marquette Nat'l Bank of Minneapolis*, 439 U.S. 299, 99 S.Ct. 540, 58 L.Ed.2d 534 (credit card subsidiary); *American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C.Cir.1988) (subsidiary offering municipal bond insurance); *M & M Leasing Corp. v.*

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[8] The OCC also recognized several years ago, in 1966, that national banks are empowered to conduct authorized banking business through subsidiaries by its announcement in the Federal Register:

> The Comptroller of the Currency has confirmed his position that a national bank may acquire and hold the controlling stock interest in a subsidiary operations corporation. . . . A subsidiary operations corporation is a corporation the functions or activities of which are limited to one or several of the functions or activities that a national bank is authorized to carry on.
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> * * * * * *
>
> [T]he authority of a national bank to purchase or otherwise acquire and hold stock of a subsidiary operations corporation may properly be found among 'such incidental powers' of the bank 'as shall be necessary to carry on the business of banking,' within the meaning of 12 U.S.C. 24(7), or as an incident to another Federal banking statute which empowers a national bank to engage in a particular function or activity. . . . The visitorial powers vested in this Office are adequate to ascertain compliance by bank subsidiaries with the limitations and restrictions applicable to them and their parent national banks.

Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed.Reg. 11,459 at 11,459-60 (Aug. 31, 1966). This interpretative pronouncement reflected OCC's then-held view on existing law. *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C.Cir.1952) ("Administrative officials frequently announce their views as to the meaning of statutes or regulations.").

Seattle First Nat'l Bank, 563 F.2d 1377 (9th Cir.1977) (motor vehicle leasing by subsidiary). It is pellucid that "'the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking.'" *Bank of America*, 309 F.3d at 563 (citation omitted). It is also clear "that the OCC has been delegated the authority to determine, with . . . considerable discretion[ ]," whether national banks may conduct banking business through operating subsidiaries. *Wells Fargo Bank of Texas NA v. James*, 321 F.3d 488, 493 (5th Cir.2003).

The OCC's regulation authorizing national banks to conduct permissible banking business activities through operating subsidiaries is within its discretionary authority delegated to it by Congress and is a reasonable interpretation of the Act. Since the OCC's "determination as to what activities are authorized under the National Bank Act [is to] be sustained if reasonable," *First Nat'l Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775, 777-78 (8th Cir.1990), Plaintiffs prevail on their position that WFHMI is an operating subsidiary of a national bank.

C. *OCC's Exclusive Visitorial Powers Over Operating Subsidiaries*

Notwithstanding Wells Fargo's right to conduct business through an operating subsidiary, the Commissioner argues he has visitorial powers over WFHMI by virtue of state law, which the OCC seeks to extinguish by impermissibly asserting exclusive visitorial powers. The OCC asserts "[b]ecause federal law prohibits the [Commissioner] from exercising visitorial powers over a national bank engaged in real estate lending pursuant to federal law, the [Commissioner] may not exercise visitorial power over the national bank conducting that activity through an operating subsidiary licensed by the

OCC, absent federal law dictating a contrary result."[9] (OCC Amicus Br. at 14.)

The issue is whether the OCC was empowered under the Act to enact 12 C.F.R. § 7.4006, which prescribes: "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[10] Section 7.4006 is to be upheld if it is "'a reasonable interpretation of § 24 (Seventh).'" *Bank of America*, 309 F.3d at 562 (citation omitted). Since the OCC is the regulator of national banks and administrator of the Act, its position on its authority to enact § 7.4006 is entitled to "'great weight.'" *Id.* It is plain that the Act delegated the OCC the authority to promulgate § 7.4006 and § 7.4006 reflects a reasonable construction of the Act.

Because WFHMI "is treated as a department or division of its parent [national bank] for regulatory purposes," the Commissioner lacks visitorial power over WFHMI just as it lacks visitorial power over WFHMI's national bank parent. *WFS Financial, Inc. v. Dean*, 79 F.Supp.2d 1024, 1026 (W.D.Wis. 1999); *see* 12 U.S.C. § 484 (prescribing that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law . . ."); *see also Nat'l State Bank,*

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[9] Under 12 U.S.C. § 371, national banks "may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate. . . ."

[10] Section 7.4006, considered in conjunction with 12 C.F.R. § 5.34(e)(3) and 12 U.S.C. § 484, evinces that the OCC is exercising exclusive visitorial powers over operating subsidiaries. Section 5.34(e)(3) provides: "If, upon examination, the OCC determines that the operating subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety or soundness of the bank, the OCC will direct the bank or operating subsidiary to take appropriate remedial action, which may include requiring the bank to divest or liquidate the operating subsidiary, or discontinue specified activities."

Elizabeth, N.J. v. Long, 630 F.2d 981, 988 (3d Cir.1980) (indicating that where allowing a state agency to exercise visitorial powers over an instrumentality of a national bank would "result in unnecessary and wasteful duplication of effort on the part of the bank and the state agency," it is "reasonable and practical" for visitorial powers to be exercised exclusively by a federal agency). "State attempts to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties." *Bank of America*, 309 F.3d at 561. Therefore, the Commissioner has no visitorial powers over WFHMI.

D. *Preemption Violates California's Sovereignty Under the Tenth Amendment*

The Commissioner further argues that "[b]y promulgating regulations seeking to regulate operating subsidiaries of national banks to the exclusion of states, the OCC is interfering with California's constitutional sovereignty under the Tenth Amendment and taking away the state's power to regulate and enforce its laws against state-chartered corporations such as WFHMI." (Def.'s Memo. at 10.) When WFHMI became an OCC authorized operating subsidiary of a national bank it ceased being subject to the visitorial power of the Commissioner and became regulated by the OCC. This change in regulatory authority from the Commissioner to the OCC has not been shown to infringe California's rights under the Tenth Amendment.

The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." It has long been recognized that the Constitution authorizes Congress to establish national banks. *See M'Culloch v. State*, 17 U.S. 316, 424-25, 4 Wheat. 316, 4 L.Ed. 579 (1819). The National Bank Act's effect of "carv-[ing] out from state control supervisory authority" over an

OCC-authorized operating subsidiary of a national bank does not violate California's Tenth Amendment rights. *First Union Nat'l Bank v. Burke*, 48 F.Supp.2d 132, 148 (D.Conn. 1999).

Under the national banking regulatory scheme, Congress does not direct the state executive to affirmatively function in any particular way, nor does the OCC's exercise of exclusive visitorial powers over national banks preclude the state statutory enactments from being applied to national banks, provided they are not in conflict with and thus preempted by federal banking laws. By creating such a scheme, Congress has not seized the machinery of state government to achieve federal purposes. The relegation of regulatory and supervisory authority over federal instrumentalities to a single federal regulator does not interfere with the Commissioner's enforcement of state law against state banks, does not interfere with the state's enactment of non-preempted state banking laws applicable to national banks, does not preclude the Commissioner from seeking OCC enforcement of state laws, and expressly leaves available judicial remedies to compel national bank compliance with state law.

Id. at 148-49; *see Clark v. U.S.*, 184 F.2d 952, 954 (10th Cir.1950) ("Congress has the power to enact legislation for the protection, preservation and regulation of [national banks]" (citing *Westfall v. United States*, 274 U.S. 256, 47 S.Ct. 629, 71 L.Ed. 1036 (1927); *Farmers' and Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 1 Otto 29, 23 L.Ed. 196 (1875); *M'Culloch*, 17 U.S. 316, 4 Wheat. 316, 4 L.Ed. 579; *Doherty v. United States*, 94 F.2d 495, 497 (8th Cir.1938); *Weir v. United States*, 92 F.2d 634, 636 (7th Cir.1937))). Therefore, the OCC's regulation prescribing that it has exclusive visitorial powers over operating subsidiaries of national banks does not violate California's constitutional sovereignty under the Tenth Amendment.

For the stated reasons, Plaintiffs' motion for summary judgment is granted on their claim that the Act preempts the Commissioner from exercising visitorial powers over WFHMI, a wholly-owned operating subsidiary of Wells Fargo, licensed by the OCC to engage in real estate lending activities in California.[11]

II. *Preemption of California's Per Diem Statutes by Depository Institutions Deregulation and Monetary Control Act of 1980*

Plaintiffs also contend California's per diem statutes cannot be enforced against WFHMI because DIDMCA expressly preempts them. Under DIDMCA,

> The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is—
>
> (A) secured by a first lien on residential real property. . .
>
> (B) made after March 31, 1980; and
>
> (C) [a federally related mortgage loan.]

12 U.S.C. § 1735f-7a(a). A "federally related mortgage" "(1) is secured by residential real property designed principally for the occupancy of from one to four families; and (2) . . . (D) is made in whole or in part by any 'creditor', as defined in section 1602(f) of Title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year." 12 U.S.C. § 1725f-5(b). A "creditor" is: a person who

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[11] The Commissioner also argues that 12 C.F.R. § 7.4006 cannot be applied retroactively but that argument is mooted by the preemptive ruling on California's per diem statutes, which are the only statutes at issue with respect to the regulatory dispute over which entity is authorized to exercise visitorial powers over WFHMI.

both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.

15 U.S.C. § 1602(f). WFHMI is a creditor within the meaning of the statute. (Pls.' SUF ¶ 4.) States were able to override DIDMCA's express preemption by explicitly opting out of its terms prior to April 1, 1983. *Id.* § 1735f-7a(b)(2). California did not opt out of the DIDMCA's express preemption within the statutorily prescribed time period. (Pls.' SUF ¶ 6.)

California's per diem statutes prohibit interest from being charged on loaned mortgage funds for a period in excess of one day prior to recording of the mortgage. Cal. Civ.Code § 2948.5; Cal. Fin.Code § 50204(*o*). California Civil Code § 2948.5 provides, "[a] borrower shall not be required to pay interest on a principal obligation under a promissory note secured by a mortgage or deed of trust on real property improved with between one to four residential dwelling units for a period in excess of one day prior to recording of the mortgage or deed of trust if the loan proceeds are paid into escrow. . . ." In addition, under the CRMLA, a licensee may not "[r]equire a borrower to pay interest on the mortgage loan for a period in excess of one day prior to recording of the mortgage or deed of trust," except under certain circumstances that are not relevant to the present action. Cal. Fin.Code § 50204(*o*).

Plaintiffs argue California's per diem statutes expressly limit the amount of interest that a lender may collect on federally related mortgage loans and are therefore preempted by the DIDMCA. (Pls.' Memo. at 18-19.) Plaintiffs support

their position by relying primarily on *Shelton v. Mutual Savings and Loan Ass'n*, 738 F.Supp. 1050 (E.D.Mich.1990). In *Shelton,* the plaintiffs argued defendant Bank "violated the Michigan usury statute, M.C.L. sections 438.31c(2) and (9), by charging interest before the loan proceeds were disbursed." *Id.* at 1053. The court explained, "the broadest possible interpretation of the exemption from state usury laws is consistent with the legislative purpose [of DIDMCA]," and therefore held Michigan's usury law was preempted by DIDMCA. *Id.* at 1057-58.

The Commissioner argues that the per diem statutes are unrelated to the California Usury Law[12] and "do nothing more than compel a close relationship between the date interest charges begin and the date of recordation of the deed of trust." (Def.'s Memo. at 26.) Further, the Commissioner contends the purpose behind the per diem statutes' limitation on interest charges "is to protect the consumer from paying interest on money that has not bought him the benefit of his bargain."[13] (*Id.*) Plaintiffs counter that DIDMCA is not

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[12] California's usury law is found in California Constitution, Article XV, § 1.

[13] During the May 5 hearing, light was shed on the usurious nature of California's per diem interest statutes and the benefit of the bargain the statutes are designed to help borrowers realize. At the hearing the Commissioner's counsel was asked, "What's a usury law?" In response he said, "I think [it] is a cap or ceiling on the actual amount-the actual rate of interest charged . . . ." (RT at 9.) During the exchange with the Commissioner's counsel, he argued that "the benefit of the bargain is buying the house, i.e., getting clear title to the house, getting to live in the house, the keys to the house, really the issue is that that benefit only accrues or occurs when recordation occurs." It is-I would doubt very much that most banks would let me move into a house before they've recorded their mortgage on that house. (RT at 11.)

Further, the Commissioner's counsel argued that California's per diem statute seeks to encourage mortgage lenders to "keep the process moving fast . . . by limiting the interest to one day." (RT at 15-16.) When counsel was questioned about admitting that the statute limits the amount of in-

limited to preempting only state usury statutes, arguing "if Congress had intended DIDMCA's preemption laws to apply only to a subset of state laws limiting the rate or amount of interest, Congress would have said so." (Pls.' Opp'n to Def.'s Mot. for Summ. J. ("Pls.' Opp'n") at 17.)

DIDMCA preempts "[t]he provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved. . ." on particular types of loans. 12 U.S.C. § 1735f-7a(a). The language of the statute does not expressly limit the preemptive scope of DIDMCA to state usury laws. But the relevant legislative history makes clear that Congress just intended to create a limited preemption of state usury laws. *See Brown v. Investors Mortgage Co.*, 121 F.3d 472, 476 (9th Cir.1997) ("Congress made specific findings that modification of state usury laws was necessary for a stable national financial system."). The Senate Report that accompanied the bill containing what became 12 U.S.C. § 1735f-7a provides:

> In order to ease the severity of the mortgage credit crunches of recent years and to provide financial institutions, particularly those with large mortgage portfolios, with the ability to offer higher interest rates on savings deposits, H.R. 4986 as reported by the Committee would preempt any state constitutional or statutory provision setting a limit on mortgage interest rates. . . .

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terest, he said he mis-spoke and instead intended to use the word "controls," "because . . . this statute basically sets when the lender can begin to compute the interest on the loan." (RT at 16.)

The Commissioner's shift in analytic focus from the per diem statutes limiting interest to one day to the word "controls" cannot be squared with his position on the real goal of the statutes, which is to prevent the lender from collecting interest on loaned mortgage funds in excess of one day prior to recordation.

> H.R. 4986 as amended provides for a limited preemption of state usury laws. It provides that the state constitutional or statutory restrictions on the amount of interest, discount points or other charges on any loan, mortgage or advance secured by real estate which is described in section 527(B) of the National Housing Act are exempt from usury ceilings. . . .
>
> The Committee believes that this limited modification in state usury laws will enhance the stability and viability of our nation's financial system and is needed to facilitate a national housing policy and the functioning of a national secondary market in mortgage lending. . . .
>
> In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charges, attorney fees, late charges or similar limitations designed to protect borrowers.

S.Rep. No. 96-368, at 18-19 (1979), *reprinted in* 1980 U.S.C.C.A.N. 236, 254-55.

Plaintiffs contend the Commissioner's argument that the per diem statutes are not usury laws "is essentially a tautology, since usury laws are defined as 'collectively, the laws of a jurisdiction regulating the charging of interest.'" (Pls.' Opp'n at 17 (quoting Black's Law Dictionary 1545 (6th ed.1990)).) "Usury is the receiving, securing, or taking of a greater sum or value for the loan or forbearance of money, goods, or things in action than is allowed by law, the exaction of a greater sum for the use of money than the highest rate of interest allowed by law." 45 Laura Dietz & Anne M. Payne, *American Jurisprudence, Interest and Usury* § 2 (2d ed. 2002); *see also Bernie's Custom Coach v. Small Business Admin.*, 987 F.2d 1195, 1197 (5th Cir.1993) ("A usurious contract consists of a loan of money 'which requires a greater

interest than allowed by law.'"). In California, "usury" has been defined as "taking more than the law allows upon a loan or for forbearance of a debt." *Hall v. Beneficial Finance Co.*, 118 Cal.App.3d 652, 654, 173 Cal.Rptr. 450 (1981) (citation omitted). By prohibiting lenders from commencing to charge interest on loaned mortgage funds until one day prior to recordation, California's per diem statutes constitute usury laws.

Nevertheless, the Commissioner argues California's per diem statutes do not fall within the preemptive scope of DIDMCA because they are designed to protect consumers and do not expressly limit interest rates or amounts. (Def.'s Memo. at 28.) The Commissioner compares California's per diem statutes with the simple interest statute ("SIS") that was held not preempted by DIDMCA in *Grunbeck v. Dime Savings Bank of New York*, 74 F.3d 331 (1st Cir.1996). The SIS requires that any interest rate or amount agreed to by the parties be computed on a "simple interest" basis. *Grunbeck*, 74 F.3d at 337. The court explained,

> [t]he SIS . . . does not "serve to . . . restrain" either the rate or the amount of simple interest which may be obtained, since the lender remains free to compensate by increasing the simple interest rate. Thus, the SIS does not "expressly" limit "the rate or amount of interest." Nor, in the alternative, does the SIS-as distinguished from market forces-"limit" the rate or amount of interest if "limit" means a "final, utmost or furthest boundary" on the rate or amount of interest, since the SIS imposes no ceiling whatsoever on either the rate or amount of simple interest that may be exacted.

Id. at 338 n. 6.

Plaintiffs retort *Grunbeck* is factually distinguishable. Unlike the SIS, California's per diem interest restriction does not leave "entirely to the parties the rate and amount of . . .

interest to be exacted" because once the lender and borrower's loan transaction is finalized, the lender has no way of collecting interest on loaned mortgage funds that would have been collected absent delays in recording the deed of trust. *Grunbeck*, 74 F.3d at 337. WFHMI is unable to bargain for a higher interest rate to compensate it for the possible delay in recordation of the mortgage or deed of trust because such delay is typically caused by the actions of others: the settlement agents, the escrow company, and the county clerk who records the mortgage. Thus the statute in *Grunbeck* simply limited the manner in which the lender expressed its interest rate without limiting the total amount of interest charged over the course of the loan. In contrast, California's per diem statutes prevent the lender from charging a specific pre-determined amount of interest over the course of the loan by tying the total amount of interest charged to events outside the lender's control which will not occur until after the loan is made.

Plaintiffs further contend the per diem interest statutes do not protect consumers by ensuring they receive the benefit of their bargain because "the purpose of recording the deed of trust is to protect the lender, not the borrower." (Pls.' Opp'n at 15.) Therefore, "a delay in recording the deed of trust does not deprive the borrower of the 'benefit of his bargain' with the lender." (*Id.*)

The Commissioner's argument that the per diem statutes are designed to protect consumers from unseen costs is unpersuasive.[14] Once the lender distributes funds to the borrower, the borrower has received the "benefit of the bargain." The act of recordation of the mortgage or deed of trust simply provides "constructive notice" of the contents of the recorded

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[14] The Commissioner has also argued that this limitation is permitted under the DIDMCA's exception for "other charges," but it is pellucid that the per diem statutes cover interest, not other charges.

documents to third parties. *See Domarad v. Fisher & Burke, Inc.*, 270 Cal.App.2d 543, 554, 76 Cal.Rptr. 529 (1969) ("The purpose of the recording statutes is to give notice to prospective purchasers or mortgagees of land of all existing and outstanding estates, titles or interest, whether valid or invalid, that may affect their rights as bona fide purchasers.").

Yet DIDMCA preempts only those state laws "expressly limiting the rate or amount of interest . . ." charged on particular residential mortgage loans. 12 U.S.C. § 1735f-7a(a). "When engaged in the task of statutory interpretation, 'courts . . . should . . . attempt to give meaning to each word and phrase.'" *Grunbeck*, 74 F.3d at 338 (citation omitted). Thus, the question is whether the per diem statutes expressly place a ceiling on interest rates or amounts. California's per diem statutes limit the time during which interest can be charged by prohibiting a lender from charging interest on loaned mortgage funds for a period in excess of one day prior to recordation of the mortgage. Cal. Civ.Code § 2948.5; Cal. Fin.Code § 50204(*o*). By restricting the time period in which a lender may collect interest on loaned mortgage funds, the language of the per diem statutes "expressly limit[s] the rate or amount of interest . . . which may be charged . . . ." Therefore, DIDMCA preempts California's per diem statutes. Plaintiffs' motion for summary judgment on this claim is granted.

III. *Retaliation Claim*

The Commissioner argues his entitlement to summary judgment on Plaintiffs' retaliation claim, contending the record shows he did not institute administrative revocation proceedings to revoke WFHMI's CRMLA and CFLL licenses in retaliation for Plaintiffs' filing this federal lawsuit against his regulatory authority over WFHMI. Under *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), even if Plaintiffs show that the Commissioner's licensing revocation decision was motivated

by Plaintiffs' filing this federal lawsuit, the Commissioner could still prevail on his motion if he demonstrates the absence of a genuine issue of material fact as to whether he would have reached the same decision even in the absence of Plaintiffs' filing this lawsuit.

A. *Undisputed Facts Applicable to Retaliation Claim*

The uncontroverted evidence shows since 1996 until some time in 2003, WFHMI held CRMLA and CFLL licenses, which WFHMI used to engage in real estate lending activities in California. These licenses required WFHMI to comply with the Commissioner's regulatory authority. *See* Cal. Fin. Code § 50124(a)(7).

Since August 2001, the Commissioner has conducted examinations of WFHMI under the CRMLA without any objection from WFHMI and commenced three examinations under CFLL. On or about December 4, 2002, the Commissioner demanded that WFHMI submit to an audit of its residential mortgage loans made in California during 2001 and 2002, so he could identify whether loans existed where per diem interest was charged in violation of California law. Between December 2002 and January 2003, Plaintiffs' counsel requested and received more time to respond to the Commissioner's demand. On or about January 17, 2003, the Commissioner sent a letter to WFHMI's counsel requesting WFHMI's compliance with the audit demand by January 23, 2003.

On or about January 22, 2003, WFHMI sent a letter to the Commissioner objecting to his request, and expressly stating since WFHMI is an operating subsidiary of a national bank it is only subject to the OCC's visitorial powers. Plaintiffs subsequently sued the Commissioner in this federal lawsuit, alleging federal preemption claims and seeking "to prevent the Commissioner from requiring WFHMI to be licensed in order to operate lawfully in California, or in the alternative,

from taking away those [California] licenses." (First Am. Compl. ¶ 3.)

On February 4, 2003, the Commissioner instituted two separate administrative proceedings to revoke WFHMI's CRMLA and CFLL licenses, based on the Commissioner's findings that WFHMI violated Financial Code §§ 50204, subdivisions (i), (j), (k) and (*o*) and 50307(b). The Commissioner opined that a fact or condition existed, which if known at the time of original licensure, would have justified the Commissioner's refusal to issue the license; and that therefore the information constituted grounds to revoke WFHMI's licenses. Because of the Commissioner's institution of license revocation proceedings, Plaintiffs added a retaliation claim to their Complaint.

B. *Ruling on Retaliation Claim*

Plaintiffs have not presented facts controverting the Commissioner's evidentiary showing that he was going to exercise his regulatory authority over WFHMI whether or not it challenged him in a lawsuit, and that his decision to invoke licensing revocation proceedings against WFHMI was not "infected with a retaliatory motive traceable to [Plaintiffs' filing this federal action]." *Huang v. Bd. of Governors of Univ. of N.C.*, 902 F.2d 1134, 1141 (4th Cir.1990).

Summary judgment jurisprudence required Plaintiffs to controvert the Commissioner's evidentiary showing (that his licensing revocation decision was not infected by a retaliatory motive) with more evidence than the evidence indicating that the federal lawsuit played a role or was a motivating factor in the licensing revocation decision. Plaintiffs were obligated to show that "but for" the filing of this federal lawsuit the Commissioner would not have taken the alleged retaliatory action. *Id.* at 1140. The Commissioner points to WFHMI's violation of California Financial Code §§ 50204(i), (j), (k) and (*o*), 50307(b), and WFHMI's refusal to submit to his

regulatory authority notwithstanding its obligation to do so as a California licensee as justification for his initiation of the license revocation proceedings. Since a jury could not reasonably find "the requisite 'but for' causation," the Commissioner's summary judgment motion on Plaintiffs' retaliation claim is granted. *Id.*

IV. *§ 1983 and § 1988 Claims*

The Commissioner also argues that Plaintiffs' claims in counts I-III of their Complaint are not actionable under § 1983 because they are premised solely upon preemption, which will not support a § 1983 action. The Commissioner contends since Plaintiffs have not established a § 1983 claim, Plaintiffs' requests for attorney's fees under § 1988 is also unavailing.

The Commissioner relies primarily on *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir.1985), where the Ninth Circuit held, "although the Supremacy Clause can be used to enjoin enforcement of a state statute that runs afoul of a federal legislative scheme, it does not provide a basis for a claim *1177 under section 1983." *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222, 226 (2d Cir.1987) (discussing the holding in *White Mountain.*)

The primary function of the Supremacy Clause is to define the relationship between state and federal law. It is essentially a power conferring provision, one that allocates authority between the national and state governments; thus, it is not a rights conferring provision that protects the individual against government intrusion. The distinction between the two categories of constitutional controls has been enunciated by Professor Choper:

> When a litigant contends that the national government (usually the Congress, but occasionally the executive, either alone or in concert with the Senate) has engaged

> in activity beyond its delegated authority, or when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. The essence of a claim of the latter type-which falls into the individual rights category of constitutional issues . . . is that no organ of government, national or state, may undertake the challenged activity. In contrast, when a person alleges that one of the federalism provisions of the constitution has been violated, he implicitly concedes that one of the two levels of government-national or state-has the power to engage in the questioned conduct. The core of the argument is simply that the particular government that has acted is the constitutionally improper one. To put it another way, a federalism attack on conduct of the national government contends that only the states may so act; a federalism challenge to a state practice asserts that only the central government possesses the exerted power; neither claim denies government power altogether. . . .
>
> We believe that § 1983 was not intended to encompass those constitutional provisions which allocate power between the state and federal government.

White Mountain Apache Tribe, 810 F.2d at 848.

Plaintiffs counter that the viability of their § 1983 claims is governed by the United States Supreme Court's decision in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989), which Plaintiffs contend abrogated the holding in *White Mountain Apache Tribe*. In *Golden State*, "the Supreme Court held that an enforceable statutory 'right' arises when (1) the plaintiff is an intended beneficiary of the statutory provision at issue, (2) the statute creates a binding obligation rather than merely a congressional preference for a certain kind of conduct, and

(3) the plaintiff's interest is not so vague and amorphous as to be beyond the competence of the judiciary to enforce." *Eric L. By and Through Schierberl v. Bird*, 848 F.Supp. 303, 308 (D.N.H.1994) (*citing Golden State*).

Only the third element is decided since Plaintiffs' assertion of preemption interests in this case conflates WFHMI's federal interests with the state obligations WFHMI had as a California licensee in a manner that causes Plaintiffs' federal interests to lack a judicially manageable standard. In this lawsuit, Plaintiffs prosecuted conflicting claims: WFHMI held California licenses that subjected it to the Commissioner's visitorial powers to which it refused to submit and yet it fought the Commissioner's attempt to revoke those California licenses. The essence of the position WFHMI took was that it could renege on its California licensing requirements and yet continue to be a California licensee, because as an instrumentality of a national bank, it could operate in California under the OCC's licensing and exclusive visitorial powers.

In light of the context in which Plaintiffs' allege § 1983 claims, the judiciary is ill-equipped by the Act's terms to determine the contours of those claims. Therefore, the Commissioner prevails on this issue.

Additionally, since Plaintiffs' § 1983 claim in count IV is premised on the retaliation that has been adjudicated in favor of the Commissioner, no § 1983 claims remain in this action. Since Plaintiffs' attorney's fees claim under 42 U.S.C. § 1988 is dependent on the § 1983 claims that have been decided in the Commissioner's favor, the § 1988 claim is dismissed.

V. *Permanent Injunction*

A. *Applicable Standards*

"The requirements for the issuance of a permanent injunction are the likelihood of substantial and immediate irrepara-

ble injury and the inadequacy of remedies at law." *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1495 (9th Cir.1996). "[To] meet this standard, the plaintiffs must establish actual success on the merits, and that the balance of equities favors injunctive relief." *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir.1998). Where an injunction is sought against an agency of state government, the injunction must be scrutinized closely "to make sure that the remedy protects the plaintiffs' federal constitutional and statutory rights but does not require more of state officials than is necessary to assure their compliance with federal law." *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir.1995). "This requires both that there be a determination that the conduct of the [Commissioner] violates federal constitutional law . . . and that the scope of the injunction is no broader than necessary to provide complete relief to the named plaintiffs. . . ." *Easyriders Freedom F.I.G.H.T.*, 92 F.3d at 1496.

B. *Irreparable Harm and Inadequate Remedy at Law*

As already discussed, Plaintiffs have established actual success on the merits of their preemption claims. In addition, they are able to show "the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law." *Id.* at 1495. The Commissioner has represented that "[e]ven if a claim of federal preemption were made, Article III, Section 3.5 of the California Constitution mandates that the Commissioner enforce the laws under his jurisdiction until an appellate court has made a determination that the enforcement of the law is prohibited by federal law or regulation." (Def.'s Memo. at 35.) Therefore, despite this Court's ruling on the present motion, the Commissioner may still attempt to exercise visitorial powers over Plaintiffs and seek to enforce California's per diem statutes against them. Such action would significantly disrupt Plaintiffs' business activities and cause substantial irreparable economic loss.

Since Plaintiffs have shown the relevant provisions of the California law are preempted by federal law and that they will suffer irreparable harm if the Commissioner is not enjoined from enforcing those provisions, then "the question of harm to [California] and the matter of the public interest drop from the case, for [Plaintiffs] will be entitled to injunctive relief, [since] . . . the public interest will perforce be served by enjoining the enforcement of the [preempted] provisions of state law." *Bank One, Utah v. Guttau*, 190 F.3d 844, 847-48 (8th Cir.1999). Therefore, Plaintiffs' motion for a permanent injunction is granted. Accordingly, the Commissioner and agents acting on behalf of the Commissioner are enjoined from exercising visitorial powers over Plaintiffs and from enforcing California Financial Code § 50204(*o*) and California Civil Code § 2948.5 against Plaintiffs.

The Clerk of the Court is directed to enter judgment in favor of Plaintiffs on their Supremacy Clause preemption claims and in favor of the Commissioner on Plaintiffs' retaliation, § 1983, and § 1988 claims.

IT IS SO ORDERED.

APPENDIX H

UNITED STATES DISTRICT COURT
E.D. CALIFORNIA

No. CIV.S-03-0157 GEB JFM

WELLS FARGO BANK, N.A., and
WELLS FARGO HOME MORTGAGE, INC.,
Plaintiffs,

v.

DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations,
Defendant.

March 10, 2003

BURRELL, *District Judge*.

Plaintiffs Wells Fargo Bank, N.A. ("Wells Fargo") and Wells Fargo Home Mortgage, Inc. ("WFHMI") move for a preliminary injunction seeking to enjoin Defendant Demetrios Boutris, in his official capacity as the Commissioner of the California Department of Corporations ("the Commissioner") "from enforcing the California Residential Mortgage Lending Act, Cal. Fin.Code § 50002 *et seq.* (including § 50204(*o*)), California Civil Code § 2948.5, and the California Financial Lenders Law, Cal. Fin.Code § 22000 *et seq.*, against [Wells Fargo and WFHMI]; from revoking WFHMI's licenses to do business in California under those laws; and from otherwise taking any action against WFHMI for continuing to do business in the state of California." (Pls.' Mot. for Prelim. Inj. at 1-2.) The essence of Plaintiffs' argument is that they are subject exclusively to federal regulation by the Office of the

Comptroller of the Currency ("OCC") since federal banking law preempts the Commissioner's regulatory authority over federally regulated national banks. The OCC filed an amicus curiae brief in which it contends the National Bank Act precludes the Commissioner from exercising visitorial powers over Plaintiffs. The Commissioner opposes the motion and filed an opposition to the OCC's amicus curiae brief. The Commissioner argues that because WFHMI possesses California-issued licenses it is obligated to comply with all licensing requirements; and that "Congress has not vested in the [OCC] to the exclusion of the states, the power to control or regulate operating subsidiaries of national banks."[1] (Commissioner's Opp'n to OCC's Amicus Br. at 2.) The Commissioner concedes "it is undisputed that the OCC has exclusive regulatory authority over Wells Fargo, a national bank." (Opp'n to Mot. at 2, n.1.)

The motion was argued March 10, 2003.[2]

Background

Wells Fargo is a federal national bank organized under the National Bank Act. (Pls.' Memo. of P. & A. in Support of Mot. for Prelim. Inj. at 3; Decl. of Stumpf in Support of Prelim Inj. ¶ 2.) WFHMI is a wholly owned operating subsidiary of Wells Fargo. (Pls.' Memo. of P. & A. at 3; Decl. of Moskowitz Ex. 1.) WFHMI is licensed to engage in real estate lending activities under the California Residential

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[1] The Commissioner argues there is no credible evidence that WFHMI is an operating subsidiary. However, an OCC letter dated October 16, 2001, "confirms that [WFHMI] is an operating subsidiary of Wells Fargo Bank, N.A." (Decl. of Moskowitz Ex. 1.)

[2] The OCC appeared through counsel and was allowed to argue at the hearing. The Order filed February 19, 2003, granted the OCC's request "to appear *amicus curiae* in this action so it could 'present oral argument' and have considered the Memorandum *Amicus Curiae* of the Office of the Comptroller of the Currency in Support of Plaintiffs' Motion for a Preliminary Injunction filed on February 14, 2003."

Mortgage Lending Act ("the RMLA") and the California Finance Lenders Law ("the CFLL"). (Decl. of Burns ¶¶ 5, 7, Ex. 3; Decl. of Agbonkpolar ¶ 4; Decl. of Wissinger ¶¶ 5, 7.)

Following several regulatory examinations, the Commissioner demanded on December 4, 2002, that WFHMI conduct an audit of its residential mortgage loans made in California during 2001 and 2002. (Decl. of Burns ¶ 15, Ex. 7.) This required audit was to identify; all loans where per diem interest was charged by WFHMI in violation of *California Financial Code* § 50204(*o*), those consumers entitled to a refund, and instances of understating finance charges in violation of the Truth in Lending Act and *California Financial Code* §§ 50204(i)(j) and (k). (Decl. of Burns Ex. 7.) WFHMI responded to the Commissioner's demand for an audit in a letter dated January 22, 2003, asserting because it is an operating subsidiary of a national bank it is subject to the exclusive federal regulation and supervision of the OCC; however, it proposed an alternate audit to accommodate the Commissioner's concerns. (Decl. of Burns Ex. 9.) The Commissioner demanded compliance. Subsequently, Plaintiffs commenced this federal lawsuit against the Commissioner on January 27, 2003. On February 4, 2003, the Commissioner instituted proceedings to revoke WFHMI's licenses issued under the RMLA and the CFLL. (*Id.* ¶ 22; Decl. of Wissinger Ex. 1, Ex. 2.)

Preliminary Injunction Standards

To prevail on the motion for a preliminary injunction, each Plaintiff must demonstrate either: "(1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted; or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor." *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir.1993). "Each of these two formulations requires an examination of both the potential merits of the asserted claims and the harm or hard-

ships faced by the parties." *Sammartano v. First Judicial Dist. Court, in and for County of Carson City*, 303 F.3d 959, 965 (9th Cir.2002). "The alternative standards are not separate tests but the outer reaches of a single continuum," *Int'l Jensen, Inc.*, 4 F.3d at 822 (quotations and citations omitted), "in which the required degree of irreparable harm increases as the probability of success decreases." *Sammartano*, 303 F.3d at 965. When the action involves the public interest, "the district court must also examine whether the public interest favors the plaintiff." *Id.*

Discussion

Plaintiffs argue the Commissioner's attempt to enforce the RMLA and the CFLL against WFHMI runs afoul of the National Bank Act. Plaintiffs contend this Act grants the OCC the exclusive authority to exercise visitorial powers over national banks and their operating subsidiaries; therefore, WFHMI is not required to hold a license under the RMLA or the CFLL to engage in residential mortgage lending and servicing business in California. (Pls.' Memo. of P. & A. at 16-17.) The OCC's amicus curiae brief agrees with Plaintiffs' position, stating that "in its capacity as administrator of the national banking system . . . [and] pursuant to 12 U.S.C. § 484 and federal regulations, the OCC has exclusive 'visitorial' power over national banks and their operating subsidiaries except where federal law specifically provides otherwise."[3] (OCC Amicus Br. at 2.) The Commissioner counters

[3] The OCC explains "the term 'visitorial' powers as used in section 484 generally refers to the power of the OCC to 'visit' a national bank to examine its activities and its observance of applicable laws, and encompasses any examination of a national bank's records relative to the conduct of its banking business as well as any enforcement action that may be undertaken for violations of law." (OCC Amicus Br. at 2-3.) 12 C.F.R. § 7.4000(a)(2) provides that visitorial powers include: "examination of a bank;" "inspection of a bank's books and records;" "regulation and supervision of activities authorized or permitted pursuant to federal banking law; and" "enforcing compliance with any applicable federal or

that the OCC seeks to exceed its visitorial powers over national banks by unlawfully expanding its jurisdiction to include operating subsidiaries of national banks. (Def.'s Memo. of P. & A. at 13-14.)

National Bank Act

National banks are created and governed by the National Bank Act. 12 U.S.C. § 21 *et seq.* The National Bank Act was enacted to "facilitate . . . 'a national banking system,'" *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978) (quoting Cong, Globe 38th Cong. 1st Sess., 1451 (1864)), and "to protect national banks against intrusive regulation by the States." *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 561 (9th Cir.2002). The National Bank Act provides that such banks shall have power

> [t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes. . . .

12 U.S.C. § 24(Seventh). The United States Supreme Court stated that the National Bank Act has charged the Comptroller with the supervision of the Act, and that the Comptroller bears "primary responsibility for surveillance of 'the business of banking' authorized by § 24 (Seventh)." *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995); *see* 12 U.S.C. § 1, 26-27, 481. The United States

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state laws concerning those activities." 12 U.S.C. § 484(a) proscribes "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress. . . ."

Supreme Court held that the "'business of banking' is not limited to the enumerated powers in § 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated. The exercise of the Comptroller's discretion, however, must be kept within reasonable bounds." *NationsBank of North Carolina, N.A.*, 513 U.S. at 258 n. 2, 115 S.Ct. 810.

The OCC-promulgated regulation regarding the exercise of visitorial powers over national banks provides:

> Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.

12 C.F.R. § 7.4000.

At the March 10 hearing, the Commissioner argued that the OCC does not have exclusive visitorial powers over WFHMI because nothing in the National Bank Act authorizes the OCC to exercise this exclusive authority. Rather, the Commissioner asserted, at most the OCC has concurrent visitorial powers over WFHMI. The Commissioner further argued that should the Court find that 12 C.F.R. § 7.4006 provides the OCC with exclusive visitorial powers over WFHMI, since that regulation did not become effective until August 2001, it has no preemptive effect on the Commissioner's ability to exercise visitorial powers over WFHMI before its enactment. The OCC disagrees, arguing that the Commissioner's position

violates the Congressional enactment in 12 U.S.C. § 484(a), and the intent of 12 C.F.R. § 7.4006.

Operating Subsidiaries

The OCC asserts that "[p]ursuant to their authority under 12 U.S.C. § 24 (Seventh) to exercise 'all such incidental powers as shall be necessary to carry on the business of banking,' national banks have long used separately incorporated entities to engage in activities that the bank itself is authorized to conduct. [Such authority] has been expressly recognized for nearly 40 years." (OCC Amicus Br. at 11-12.)

The Operating Subsidiary Rule, codified at 12 C.F.R. § 5.34, regulates the authority of national banks to engage in activities through operating subsidiaries. "A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC, or otherwise under other statutory authority. . . ." 12 C.F.R. § 5.34(e)(1). Section 5.34(e)(3) provides that "[a]n operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. § 7.4006 provides that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."

At the March 10 hearing, the Commissioner pressed his position that no provision of the National Bank Act grants national banks authority to own or establish operating subsidiaries or to conduct their lending activities through such subsidiaries. The OCC counters that it has interpreted the language of 12 U.S.C. § 24 (Seventh), which authorizes national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking," as

authorizing national banks through the OCC to use subsidiaries to conduct banking business. "Incidental powers [in § 24 (Seventh)] include activities that are 'convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act.'" *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 562 (9th Cir.2002) (citations omitted). The OCC's recognition of national banks' authority to conduct authorized banking business through subsidiaries dates back to 1966. At that time, the OCC issued rules permitting national banks to

> acquire and hold the controlling stock interest in a subsidiary operations corporation. . . . A subsidiary operations corporation is a corporation the functions or activities of which are limited to one or several of the functions or activities that a national bank is authorized to carry on.
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> * * * * * *
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> [T]he authority of a national bank to purchase or otherwise acquire and hold stock of a subsidiary operations corporation may properly be found among 'such incidental powers' of the bank 'as shall be necessary to carry on the business of banking,' within the meaning of 12 U.S.C. 24(7), or as an incident to another Federal banking statute which empowers a national bank to engage in a particular function or activity. . . . The visitorial powers vested in this Office are adequate to ascertain compliance by bank subsidiaries with the limitations and restrictions applicable to them and their parent national banks.
>
> Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed.Reg. 11,459 at 11,459-60 (Aug. 31, 1966).

Plaintiffs and the OCC also argue that the Gramm-Leach-Bliley Act ("GLBA") acknowledges national banks' authority to conduct banking business through operating subsidiaries. *See* 12 U.S.C. § 24a. The GLBA defines a financial subsidiary as something "other than a subsidiary that . . . engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks. . . ." *Id.* § 24a(g)(3). The Commissioner disputes the OCC's position on the GLBA, relying on a Report of the Senate Committee on Banking, Housing, and Urban Affairs, which he argues reveals Congress did not recognize operating subsidiaries in the GLBA. (Commissioner's Opp'n to Amicus Br. at 5.) However, that Report specifically addresses national banks' authority to conduct authorized banking business through operating subsidiaries:

> For at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national banks may engage in directly. For example, national banks are authorized directly to make mortgage loans and engage in related mortgage banking activities. Many banks choose to conduct these activities through subsidiary corporations. Nothing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations, or to invest in joint ventures to engage in bank permissible activities with other banks or nonbank companies.

S.Rep. No. 106-44, at 6 (1999).

Finally, operating subsidiaries and national banks have been treated as equivalents in court decisions determining whether a particular activity was permissible for a national bank. *See NationsBank of North Carolina, N.A.*, 513 U.S. at

254, 115 S.Ct. 810 (brokerage subsidiary acting as an agent in the sale of annuities); *Marquette Nat'l Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978) (credit card subsidiary); *American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C.Cir.1988) (subsidiary offering municipal bond insurance); *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377 (9th Cir.1977) (motor vehicle leasing by subsidiary). Therefore, the OCC's interpretation that national banks are authorized to conduct permissible banking business activities through operating subsidiaries appears to be reasonable and entitled to deference.

As stated in *First Nat'l Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775, 777-78 (8th Cir.1990),

> the Supreme Court has made clear that the Comptroller's interpretation of the National Bank Act must be given "great weight":
>
> "It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws." The Comptroller's determination as to what activities are authorized under the National Bank Act should be sustained if reasonable.

(Citations omitted); *see also NationsBank of North Carolina, N.A.*, 513 U.S. at 256-57, 115 S.Ct. 810 (same).

OCC's Exclusive Visitorial Powers over Operating Subsidiaries

Notwithstanding the likelihood that Plaintiffs will prevail on their claim that WFHMI has the status of an operating subsidiary of a national bank, the Commissioner contends he

has joint visitorial powers over WFHMI at least prior to August 2001. The OCC counters, "Because federal law prohibits the [Commissioner] from exercising visitorial powers over a national bank engaged in real estate lending pursuant to federal law, the [Commissioner] may not exercise visitorial power over the national bank conducting that activity through an operating subsidiary licensed by the OCC, absent federal law dictating a contrary result." (OCC Amicus Br. at 14.) The OCC explained in its interpretive letter to the Commissioner, dated February 11, 2003, the following:

> As an operating subsidiary of a national bank, WFHMI is subject to ongoing supervision and examination by the OCC in the same manner and to the same extent as the [Wells Fargo] Bank. . . . [P]ursuant to 12 U.S.C. § 484, and 12 C.F.R. § 5.34(e)(3) and 7.4006, the OCC has exclusive visitorial authority over national banks and their operating subsidiaries except where *Federal* law provides otherwise. This authority pertains to activities expressly authorized or recognized as permissible for national banks under Federal law or regulation, or by OCC issuance or interpretation, including the content of those activities and the manner in which, and standards whereby, those activities are conducted. As a result, States are precluded from examining or requiring information from national banks or their operating subsidiaries or otherwise seeking to exercise visitorial powers with respect to national banks or their operating subsidiaries in those respects. Thus, Federal law precludes examination of WFHMI by the [Commissioner].

(*Id.* Ex. 1 at 1-2.) Because the OCC's construction of the National Bank Act is articulated in an amicus brief and an interpretive letter "does not make it 'unworthy of deference.'" *Bank of America*, 309 F.3d at 563 n. 7. The OCC's amicus brief and interpretive letter appear to be "both persuasive and

consistent with the National Bank Act and OCC regulations and thus at least 'entitled to respect.'" *Id.*

During the March 10 hearing, OCC pointed to the Third Circuit decision in *Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3d Cir.1980), as support for its position that the OCC has exclusive visitorial powers over WFHMI whether or not the enforcement of California law is involved. *Long* reveals, "Questions about the applicability of state legislation to national banks must be distinguished from the related inquiry of who is responsible for enforcing national bank compliance." *Long*, 630 F.2d at 987-88. In light of the respect that is to be given to the OCC's construction of the National Bank Act articulated in its brief and its interpretive letter where it opines it has exclusive visitorial power over WFHMI as a subsidiary of a national bank, Plaintiffs are likely to prevail on the merits of their claim that the OCC's recognition of WFHMI's status as an operating subsidiary is all that is needed for it to conduct its residential mortgage lending in California. Accordingly, the Commissioner's argument that he has dual visitorial powers with the OCC is not likely to prevail because allowing the Commissioner to exercise visitorial powers over WFHMI would appear to "result in unnecessary and wasteful duplication of effort on the part of the bank and the state agency. From that standpoint enforcement exclusivity in the [OCC] is reasonable and practical." *Id.* at 988.

The foregoing discussion reveals that Plaintiffs have shown probable success on the merits of their claim that WFHMI is a wholly-owned operating subsidiary of Wells Fargo licensed by the OCC to engage in real estate lending activities in California, and that therefore "the National Bank Act preempts the Commissioner's authority" to prohibit WFHMI from doing this business in California and from exercising visitorial power over Plaintiffs. *First Nat'l Bank of Eastern Arkansas*, 907 F.2d at 778.

Hardships Faced by the Parties

Plaintiffs contend they will suffer irreparable harm if the Commissioner is allowed to exercise visitorial powers over them. According to Plaintiffs,

> The California residential mortgage market accounts for a significant share of WFHMI's annual loan production volume, and generates hundreds of millions of dollars each year in gross revenue for WFHMI. . . . Plaintiffs know of no way that they can recover these revenues if they ultimately succeed on the merits of this action but are impeded in their business activities by the Commissioner's actions to stop WFHMI from continuing its business operations in California for some period of time before they obtain a favorable final decision from this Court.

(Pls.' Memo. of P. & A. at 21.) Plaintiffs argue that Wells Fargo will also be irreparably harmed because the Commissioner's actions "threaten to disrupt substantially the majority of the Bank's residential mortgage lending and servicing business in California, which the Bank undertakes through WFHMI." (*Id.*) In addition, Plaintiffs estimate that the manual audit demanded by Defendant of more than 300,000 mortgage loan files will cost WFHMI "at least $60 per loan file (including file retrieval and manual file review by specially trained outside personnel), for a total audit cost of at least $18 million." (Pls.' Memo. of P. & A. at 21-22.) Plaintiffs contend such costs cannot be recovered. (*Id.* at 22.)

Public Interest

The public interest also favors Plaintiffs' position because they have a probability of succeeding on their position that since Wells Fargo is a national bank and WFHMI is an operating subsidiary of a national bank they are subject to the exclusive visitorial power of the OCC. "Because national banks are considered federal instrumentalities, states may

neither prohibit nor unduly restrict their activities." *First Nat'l Bank of Eastern Arkansas*, 907 F.2d at 778. Further, Plaintiffs have shown the possibility of irreparable injury if relief is not granted. Moreover, a serious federal and state regulatory dispute is involved and the balance of hardships tips sharply in Plaintiffs' favor on the issue that the National Bank Act prohibits the Commissioner from exercising visitorial powers over Plaintiffs. Therefore, the Commissioner is preliminarily enjoined from exercising visitorial powers over Plaintiffs.

Revocation of California Issued Licenses

WFHMI has not shown, however, a probability of success on the merits of its claim that the Commissioner should be enjoined from revoking the California licenses issued under the RMLA and the CFLL. As stated in the ruling on Plaintiffs' motion for a temporary restraining order, filed on March 6, 2003:

> Plaintiffs have not shown that California's licensing revocation proceeding must be stayed while Plaintiffs litigate their claims in federal court that WFHMI does not have to possess California licenses to do the national banking business it does in California. . . .
>
> * * * * * *
>
> It would be ironic for an injunction to issue in such circumstances since WFHMI could have avoided the harm it contends it will suffer had it chosen to comply with the requirements of the California licenses it possesses. . . .

Although it is unclear why WFHMI subjected itself to the Commissioner's regulatory authority by virtue of having become a California licensee, this does not seem to have an effect on WFHMI's right to conduct federally permissible banking activities authorized by the OCC. *See ANR Pipeline*

Co. v. Iowa State Commerce Com'n, 828 F.2d 465, 467-68 (8th Cir.1987) (revealing that even though the Pipeline Company unnecessarily obtained a state permit, it could continue doing work on an interstate gas pipeline under federal authority notwithstanding the Company's violation of the state permit's requirement).

Conclusion

Therefore, the Commissioner is preliminarily enjoined from exercising visitorial powers over Plaintiffs or from otherwise preventing WFHMI from operating in California; however, the portion of Plaintiffs' motion seeking to preliminarily enjoin the Commissioner from revoking WFHMI's California issued licenses is denied.

IT IS SO ORDERED.

APPENDIX I

FEDERAL HOME LOAN BANK BOARD

1987 FHLBB LEXIS 165

May 8, 1987

Dear [***]:

The Office of General Counsel ("OGC") of the Federal Home Loan Bank Board ("Bank Board") has recently received letters from several law firms requesting an interpretive ruling pursuant to Section 501(f) of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("Act"), 12 U.S.C.A. § 1735f-7 note (West 1980 & Supp. 1986), regarding the effect of the State of Maryland's recent amendment to Section 12-103(b) of the State's Commercial Law Code on Federally-related residential mortgage loans. This Office has been asked to concur in the view that Section 501(f) of the Act preempts this recent amendment as an express limitation on the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, or received with respect to a Federally-related loan. In this opinion, I will refer to the regulations promulgated by the Bank Board under the Act, rather than to the pertinent provisions of the Act. 12 C.F.R. Part 590 (1986).

Section 12-103(b) of the Maryland Commercial Code ("Commercial Code") provides that for loans secured by residential real property, a lender may charge interest "at any effective rate of simple interest on the unpaid principal balance of a loan" if, inter alia, there is a written agreement signed by the borrower which sets forth the rate of interest charged, there is no prepayment penalty in connection with the loan, and the loan is secured by a first mortgage or first deed of trust. Md. Com. Law Code Ann. § 12-103(b) (1983 & Supp. 1986). This section, as recently amended by Senate Bill 393, provides that as an additional prerequisite to a

lender's charging of any effective rate of interest, such lender cannot "require payment of any interest in advance except any points permitted under this subtitle." *Id.* § 12-103(b)(vi).

Section 590.3(a) of the Bank Board's regulations states the general rule for preemption of state usury laws applicable to Federally-related loans:

> The provisions of the constitution or law of any state expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any Federally-related loan:
>
> (1) Made after March 31, 1980; and
>
> (2) Secured by a first lien on:
>
> (i) Residential real property. . . .

12 C.F.R. § 590.3(a) (1986). Section 590.3(c) provides further:

> Nothing in this section preempts limitation[s] in state laws on prepayment charges; attorney's fees, late charges or other provisions designed to protect borrowers.

Id. § 590.3(c).

The Act was enacted in response to Congressional concerns that where state usury laws required mortgage rates below market levels of interest, mortgage funds in those states would not be readily available. Moreover, in addition to the need to address the adverse effects of usury ceilings on credit availability, mortgage interest rate ceilings were removed to permit savings and loan associations to begin paying market rates of interest on savings deposits.

The legislative history of the Act clearly identifies the state usury limitations from which the Act sought to exempt Federally-related mortgage loans:

In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charges, attorney fees, late charges, or similar limitations designed to protect borrowers.

S. Rep. No. 368, 96th Cong., 2d Sess. 19, reprinted in [1980] U.S. Code Cong. & Ad. News 236, 255. Prior opinions issued by this Office, citing this legislative history, have concluded that with respect to Federally-related residential mortgage loans, Congress intended to preempt all provisions of state law limiting interest charges and other charges includable in the annual percentage rate. OGC Usury Preemption Opinions Nos. 91, 19 (February 4, 1986; August 5, 1980).

Regulation z, which implements the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, defines the annual percentage rate as "a measure of the cost of credit, expressed as a yearly rate." 12 C.F.R. § 226.22 (1986). "Finance charges," which are included within the annual percentage rate, are defined to include "interest, time price differential, and any amount payable under an add-on or discount system of additional charges." *Id.* §§ 226.4(a), (b).

It is the conclusion of this Office that the prepaid or "odd days" interest addressed by the recent amendment to Maryland's Commercial Code is "interest" under the Act, and that in light of the time value of money, this amendment to the Commercial Code operates as a limitation on the amount of interest charged on a Federally-related loan. Such interest is calculated on the basis of the interest rate applied to the full term of the loan, but is obviously only applied to that fraction of a month that follows the date of closing. The shorter term to which this rate is applied for purposes of computing the

prepaid interest due does not change the nature of the charge itself; it remains interest.[1]

The DIDMCA and the Bank Board's implementing regulations preclude a state from limiting the rate or amount of interest that may be charged, taken, received, or reserved regarding Federally-related loans unless the state, on or before April 1, 1983 (and after April 1, 1980), had adopted a law or had certified that the voters of such state had voted in favor of any law which "states explicitly and by its terms" that such state does not want the Federal usury preemption to apply. 12 C.F.R. § 590.3 (1986). There is no evidence that the State of Maryland has enacted such legislation or otherwise overridden the usury preemption. Thus, it is the opinion of this Office that the Act preempts Maryland's recent amendment to Section 12-103(b) of the Commercial Code limiting the ability of a lender to require payment of interest in advance on a Federally-related residential mortgage loan.[2]

This Office also received one letter seeking our concurrence in the view that Sections 12-109.2(b) and 12-121(b) of the Commercial Code are preempted by the Act. Section

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[1] This conclusion does not overlook section 226.17(c)(4) of Regulation z, which provides that in making calculations and disclosures, first period irregularities may be disregarded in the annual percentage rate in specified instances. Prepaid interest is nevertheless includable in the annual percentage rate in such instances, and depending upon the term of the loan, may be required to be included in the annual percentage rate. *See* 12 C.F.R. § 226.17(c)(4) (1986).

I also note that the Commercial Code, which sets forth a general definition of "interest," neither distinguishes nor separately defines "prepaid interest." Compare Md. Com. Law Code Ann. § 12-101(e) with § 12-103(b)(vi).

[2] I also conclude, consistent with the views expressed in letters received from Maryland's Office of the Attorney General and others, that on the basis of its legislative history, the recent amendment to Section 12-103(b) does not impose any limitation on "points" for federally related loans secured by first liens on residential property, in violation of the Act.

12-109.2(b) provides that a lender or its assignee "may not impose a collection fee or service charge on the maintenance of an escrow account on a first mortgage or first deed of trust." Md. Com. Law Code Ann. § 12-109.2(b) (1983 & Supp. 1986). Section 12-121(b) provides that "a lender may not impose a lender's inspection fee in connection with a loan secured by residential real property" unless the inspection is needed to ascertain completion of construction of a new home or completion of repairs, alterations, or other work required by the lender. *Id.* § 12-121(b).

As previously noted, the legislative history of the Act and prior OGC opinions indicate that with respect to Federally-related residential mortgage loans, Congress intended to preempt all provisions of state law limiting interest charges and other charges includable in the annual percentage rate. The letter received seeking our concurrence that sections 12-109.2(b) and 12-121(b) are preempted asserted that such inspection fees and collection/service fees are "charges akin to service fees and loan fees," without any further citation to Regulation z or further arguments. Absent more specific arguments and/or documentation establishing that these charges are includable in the annual percentage rate (e.g., an opinion from the Federal Reserve Board as to whether such charges are includable), and arguments as to why the Maryland statute is not consistent with Section 590.3(b)(3) of the Bank Board's regulations, citing state legislative history, I am reluctant to conclude that Sections 12-109.2(b) and 12-121(b) of the Commercial Code are preempted by the Act.[3]

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[3] Through informal discussion with the staff of the Federal Reserve Board, this Office has learned that a "lender's inspection fee" is similar to the "appraisal fee" specifically excluded from the definition of "Finance Charge" under Regulation Z, and is thus likely to be excluded from the annual percentage rate. See 12 CFR § 226.4(c)(7)(ii), and Staff Commentary (1986). It is less clear whether the escrow fee or service charge is excluded under section 226.4. Such exclusion may depend upon

Should the State or other interested parties choose to address these issues more specifically, this Office will carefully weigh such arguments and issue a responsive opinion.

Sincerely,

(signed)
Harry W. Quillian
General Counsel

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whether the fee or charge is an ongoing charge, or a one-time charge for setting up the escrow account.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Civ. Act. No. S 03 0157 GEB JFM
Date: March 10, 2003
Time: 9:00 a.m.
Hon. Garland E. Burrell

WELLS FARGO BANK, N.A., and WELLS FARGO HOME MORTGAGE CO., INC.;
Plaintiffs,

v.

DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations,
Defendant.

MEMORANDUM AMICUS CURIAE OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

Interest of Amicus Curiae

The Office of the Comptroller of the Currency ("OCC") respectfully submits this brief *amicus curiae* in support of the plaintiffs' motion for a preliminary injunction. Plaintiffs seek preliminary relief to prevent defendant, as commissioner of the California Department of Corporations (the "Department"), from interfering with their rights to engage in real estate lending under the supervision of the OCC in accordance with federal law. As the federal regulator charged with overseeing the national banking system and administering the

National Bank Act, the OCC has a direct interest in ensuring that the requirements of federal law are observed and that plaintiffs may conduct their real estate lending activities to the full extent and in the manner authorized by federal law.

Statement Regarding Supervisory Framework and Factiral Background

The OCC is the bureau within the United States Treasury Department charged with the administration of the National Bank Act, 12 U.S.C. §§ 1 *et seq.*, and oversight of the national banking system. The OCC has comprehensive authority over the chartering, supervision, and regulation of virtually every aspect of banks organized under the National Bank Act, including the authority to determine whether a national bank's activities are permissible. Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo" or the "Bank"), is a national bank chartered by the OCC pursuant to federal law, and plaintiff Wells Fargo Home Mortgage, Inc. ("WFHMI"), is a wholly-owned operating subsidiary of the Bank licensed by the OCC to engage in real estate lending activities. As with any national bank operating subsidiary, applicable state and federal laws apply to WFHMI to the same extent as they apply to the Bank, and both plaintiffs, in accordance with the federal statutes and regulations under which they were chartered and licensed, are subject to the authority of the OCC.

In its capacity as administrator of the national banking system, the OCC regularly conducts extensive examinations of each national bank's business. These examinations evaluate the bank's compliance with principles of safe and sound banking as well as its compliance with federal and any applicable state laws concerning the bank's activities. 12 U.S.C. § 481. In accordance with federal law, the OCC must conduct an examination of each national bank at least once every 12 months, unless the bank has less than $250,000,000 in assets and is in good condition, in which case it need only

be examined once every 18 months. 12 U.S.C. § 1820(d)(1), (d)(4). However, the OCC may conduct a comprehensive examination more frequently if warranted by the institution's asset size, condition, or other factors, and may also conduct targeted examinations that may cover one or more elements of a comprehensive examination. Federal law authorizes the OCC to inspect the bank's records and analyze its activities, including the records and activities of any operating subsidiaries through which the bank acts in conducting its banking business. Congress also has provided the OCC an extensive array of regulatory tools with which to address unsafe or unsound banking practices or violations of law by national banks. *See, e.g.*, 12 U.S.C. §§ 93 (forfeiture of charter, civil money penalties); 1818 (cease and desist orders, restitution; removal of officers and directors; civil money penalties). Through its supervisory, regulatory and enforcement authority, the OCC oversees the activities of national banks and takes action to maintain the sound operations o f the national banking system.

Pursuant to 12 U.S.C. § 484 and federal regulations, the OCC has exclusive "visitorial" power over national banks and their operating subsidiaries except where federal law specifically provides otherwise. The term "visitorial" powers as used in section 484 generally refers to the power of the OCC to "visit" a national bank to examine its activities and enforce its observance of applicable laws, and encompasses any examination of a national bank's records relative to the conduct of its banking business as well as any enforcement action that maybe undertaken for violations of law. The Department has sought to examine WFHMI pursuant to state law. Those examinations, as well as any attempt to audit, direct the conduct of, take enforcement action against, or exercise other visitorial powers with respect to plaintiffs, are in direct conflict with the OCC's exclusive visitorial authority over national banks under federal law.

The OCC recently explained the effect of section 484 in OCC AdvisoryLetter2002-9 (Nov. 25, 2002) ("AL 2002-9"). The application of section484 to national banks and their operating subsidiaries was also explained by the OCC to representatives of the Department in telephone conversations on January 27 and February 7, 2003. Thereafter, in a letter dated February 11, 2003,[1] from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, the OCC specifically advised defendant, as the head of the Department, concerning the application of federal law in the circumstances presented by this case. Notwithstanding these communications, the defendant continues to assert authority to exercise visitorial power over WFHMI under state law. Indeed, after this suit was filed, the Department continued its efforts to examine WFHMI facilities.

National banks chartered by the OCC may engage in the business of banking and all activities incidental thereto pursuant to 12 U.S.C. § 24 (Seventh). In addition, in 12 U.S.C. § 371, Congress explicitly granted national banks authority to make, mange, and deal in loans secured by interests in real estate. Under OCC regulations, national banks also may engage in these activities through operating subsidiaries. 12 C.F.R. § 5.34. Thus federal law authorizes national banks, both directly and through OCC-licensed operating subsidiaries, to engage in a full range of real estate lending activities. In direct conflict with these authorities, the Department seeks to require national banks to obtain separate licenses from the state when they engage in real estate lending activities through federally authorized operating subsidiaries. Moreover, as an incident to that license, the Department seeks to require national bank operating subsidiaries to submit to the examination and enforcement authority of the state. These efforts are flatly contrary to federal law. Once Wells Fargo acquired WFHMI as an operating subsidiary, its federal right

[1] Attached as Exhibit 1.

to engage in real estate lending through operating subsidiaries may not be conditioned on receipt of a license from the state, and the California statutes at issue may not be applied to the Bank and WFHMI.

As the administrator of the national banking system, the OCC has a particular interest in ensuring that national banks may exercise in a safe and sound manner the powers granted them to the fullest extent and in the manner authorized by federal law. California, however, has adopted statutory provisions that purport to prohibit national banks and their operating subsidiaries from collecting interest on their real estate loans even though the funds have been disbursed to the borrower. This restriction is contained in provisions of the California Residential Mortgage Lending Act ("RMLA"), Cal. Fin. Code § 50002 *et seq.*, California Finance Lenders Law ("CFLL"), Cal. Fin. Code § 22000 *et seq.*, and Cal. Civ. Code § 2948.5, which generally prohibit a lender from collecting interest on a real estate loan for more than one day prior to the date the mortgage is recorded ("per-diem restriction"). The per-diem restriction applies regardless of when the bank provides the funds to the borrower, and purports to condition the bank's right to collect interest on events that are outside of the bank's control. Such limitations are contrary to principles of safe and sound banking and fundamentally impair a core lending business of national banks because they interfere with the bank's ability to control the date on which it begins to receive compensation for the extension of credit.

Moreover, under the Depository Institutions Deregulation and Monetary Control Act ("DIDMCA"), Congress created an express exemption to state law limitations on interest charged in connection with certain real estate loans. Unless the state has followed DIDMCA's procedures to opt out of application of the exemption, lenders within that state, including national banks, may make real estate loans without regard to the limitations on interest charges found in state

law. California did not override the application of the DIDMCA exemption to real estate mortgages within that state, yet the Department now attempts to impose limitations on the amount of interest that plaintiffs may receive on their real estate loans through application of the per diem restriction. Because the California statutes that impose the per diem restriction directly conflict with DIDMCA, they are preempted.

II. ARGUMENT

Federal law prevents the Department from exercising visitorial powers over the Bank or WFHMI, authorizes the Bank to conduct real estate lending activities directly or through WFHMI, an OCC-licensed operating subsidiary, without obtaining a license from the state, and authorizes lenders, such as plaintiffs, to make certain real estate loans without regard to state law limitations on the mount of interest charged on those loans. Accordingly, plaintiffs are entitled to prevail on the merits of their claims that federal law preempts the state statutes under which the Department asserts authority to examine, take enforcement action against, or license WFHMI, as well as the state statutes that purport to make the California per diem restriction applicable to plaintiffs. Because the Department's conduct is contrary to federal law and causes

* * * *

WFHMI conflict with federal law and are therefore rendered invalid by the Supremacy Clause of the United States Constitution.

B. DIDMCA Preempts California's Per-Diem Restriction

The Department's attempt to apply the per-diem restriction against plaintiffs is preempted by DIDMCA. In DIDMCA, Congress mandated that the "provisions of the constitutions or laws of any State expressly limiting the rate or amount of

interest, discount points, financial charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is (A) secured by a first lien on residential real property* * *." 12 U.S.C. § 1735f-7a(a)(1). The exemption provided by this statute is generally applicable to residential real estate loans that qualify as a "federally related mortgage loan" as defined in 12 U.S.C. § 1735f-5(b). A "federally related mortgage loan" is any loan that is secured by residential real property designed for occupancy by one to four families and that is made by lenders who meet certain criteria set forth in 12 U.S.C. § 1735f-5(b)(2). The loans made by plaintiffs are federally related mortgage loans to which the exemption in section 1735f-7a applies.

The per-diem restrictions at issue here specifically limit the amount of interest that a national bank may charge by preventing national banks from collecting interest on their loans for a period of time after the funds have been made available to the borrower. As applied, this restriction conflicts with the federal authorization for national banks to charge interest without regard to such state law limitations. Accordingly, it is preempted.

III. CONCLUSION

The standards for issuance of a preliminary injunction have been met in this case. Plaintiffs are being called upon to respond to the Department's examination and enforcement direction and submit to lending restrictions that result in costs to plaintiffs that cannot be recouped. For the reasons set forth above, the visitorial actions of the Department and application of the California per-diem restriction to plaintiffs are contrary to federal law, and the state statutes to which the Department looks for its authority to impose its requirements on plaintiffs are preempted. There can be no cognizable injury to defendant from being required to comply with federal law, and the public interest will be served by preserving

the OCC's exclusive visitorial power over the national banking system as intended by Congress.

Respectfully submitted,

JULIE L. WILLIAMS
First Senior Deputy Comptroller
and Chief Counsel

February 13, 2003 /s/ Horace G. Sneed
DANIEL P. STIPANO
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APPENDIX K

CONSTITUTIONAL, REGULATORY,
AND STATUTORY MATERIALS

U.S. Const. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX L

12 U.S.C. Section 1735f–7a

State constitution or laws limiting mortgage interest, discount points, and finance or other charges; exemption for obligations made after March 31, 1980

(a) Applicability to loan, mortgage, credit sale, or advance; applicability to deposit, account, or obligation

(1) The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is—

(A) secured by a first lien on residential real property, by a first lien on all stock allocated to a dwelling unit in a residential cooperative housing corporation, or by a first lien on a residential manufactured home;

(B) made after March 31, 1980; and

(C) described in section 527(b) of the National Housing Act (12 U.S.C. 1735f–5 (b)), except that for the purpose of this section—

(i) the limitation described in section 527(b)(1) of such Act that the property must be designed principally for the occupancy of from one to four families shall not apply;

(ii) the requirement contained in section 527(b)(1) of such Act that the loan be secured by residential real property shall not apply to a loan secured by stock in a residential cooperative housing corporation or to a loan or credit sale secured by a first lien on a residential manufactured home;

(iii) the term "federally related mortgage loan" in section 527(b) of such Act shall include a credit sale which is secured by a first lien on a residential manufactured home and

which otherwise meets the definitional requirements of section 527(b) of such Act, as those requirements are modified by this section;

(iv) the term "residential loans" in section 527(b)(2)(D) of such Act shall also include loans or credit sales secured by a first lien on a residential manufactured home;

(v) the requirement contained in section 527(b)(2)(D) of such Act that a creditor make or invest in loans aggregating more than $1,000,000 per year shall not apply to a creditor selling residential manufactured homes financed by loans or credit sales secured by first liens on residential manufactured homes if the creditor has an arrangement to sell such loans or credit sales in whole or in part, or if such loans or credit sales are sold in whole or in part to a lender, institution, or creditor described in section 527(b) of such Act or in this section or a creditor, as defined in section 103(f) of the Truth in Lending Act [15 U.S.C. 1602 (f)], as such section was in effect on the day preceding March 31, 1980, if such creditor makes or invests in residential real estate loans or loans or credit sales secured by first liens on residential manufactured homes aggregating more than $1,000,000 per year; and

(vi) the term "lender" in section 527(b)(2)(A) of such Act shall also be deemed to include any lender approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act [12 U.S.C. 1701 et seq.], and any individual who finances the sale or exchange of residential real property or a residential manufactured home which such individual owns and which such individual occupies or has occupied as his principal residence.

APPENDIX M

12 U.S.C. Section 1735f–7a

State constitution or laws limiting mortgage interest, discount points, and finance or other charges; exemption for obligations made after March 31, 1980

(f) Rules, regulations, and interpretations

The Federal Home Loan Bank Board is authorized to issue rules and regulations and to publish interpretations governing the implementation of this section.

APPENDIX N

12 U.S.C. Section 3801

Findings and purpose

(a) The Congress hereby finds that—

(1) increasingly volatile and dynamic changes in interest rates have seriously impared the ability of housing creditors to provide consumers with fixed-term, fixed-rate credit secured by interests in real property, cooperative housing, manufactured homes, and other dwellings;

(2) alternative mortgage transactions are essential to the provision of an adequate supply of credit secured by residential property necessary to meet the demand expected during the 1980's; and

(3) the Comptroller of the Currency, the National Credit Union Administration, and the Director of the Office of Thrift Supervision have recognized the importance of alternative mortgage transactions and have adopted regulations authorizing federally chartered depository institutions to engage in alternative mortgage financing.

(b) It is the purpose of this chapter to eliminate the discriminatory impact that those regulations have upon non-federally chartered housing creditors and provide them with parity with federally chartered institutions by authorizing all housing creditors to make, purchase, and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by the Federal agencies.

APPENDIX O

12 U.S.C. Section 3802

Definitions

As used in this chapter—

(1) the term "alternative mortgage transaction" means a loan or credit sale secured by an interest in residential real property, a dwelling, all stock allocated to a dwelling unit in a residential cooperative housing corporation, or a residential manufactured home (as that term is defined in section 5402 (6) of title 42—

(A) in which the interest rate or finance charge may be adjusted or renegotiated;

(B) involving a fixed-rate, but which implicitly permits rate adjustments by having the debt mature at the end of an interval shorter than the term of the amortization schedule; or

(C) involving any similar type of rate, method of determining return, term, repayment, or other variation not common to traditional fixed-rate, fixed-term transactions, including without limitation, transactions that involve the sharing of equity or appreciation; described and defined by applicable regulation; and

(2) the term "housing creditor" means—

(A) a depository institution, as defined in section 501(a)(2) of the Depository Institutions Deregulation and Monetary Control Act of 1980;

(B) a lender approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act [12 U.S.C. 1701 et seq.];

(C) any person who regularly makes loans, credit sales, or advances secured by interests in properties referred to in paragraph (1); or

(D) any transferee of any of them.

A person is not a "housing creditor" with respect to a specific alternative mortgage transaction if, except for this chapter, in order to enter into that transaction, the person would be required to comply with licensing requirements imposed under State law, unless such person is licensed under applicable State law and such person remains, or becomes, subject to the applicable regulatory requirements and enforcement mechanisms provided by State law.

APPEXDIX P

12 U.S.C. Section 3803

Alternative mortgage authority

(a) General authority; compliance by banks, credit unions and all other housing creditors with applicable regulations

In order to prevent discrimination against State-chartered depository institutions, and other nonfederally chartered housing creditors, with respect to making, purchasing, and enforcing alternative mortgage transactions, housing creditors may make, purchase, and enforce alternative mortgage transactions, except that this section shall apply—

(1) with respect to banks, only to transactions made in accordance with regulations governing alternative mortgage transactions as issued by the Comptroller of the Currency for national banks, to the extent that such regulations are authorized by rulemaking authority granted to the Comptroller of the Currency with regard to national banks under laws other than this section;

(2) with respect to credit unions, only to transactions made in accordance with regulations governing alternative mortgage transactions as issued by the National Credit Union Administration Board for Federal credit unions, to the extent that such regulations are authorized by rulemaking authority granted to the National Credit Union Administration with regard to Federal credit unions under laws other than this section; and

(3) with respect to all other housing creditors, including without limitation, savings and loan associations, mutual savings banks, and savings banks, only to transactions made in accordance with regulations governing alternative mortgage transactions as issued by the Director of the Office of Thrift Supervision for federally chartered savings and loan

associations, to the extent that such regulations are authorized by rulemaking authority granted to the Director of the Office of Thrift Supervision with regard to federally chartered savings and loan associations under laws other than this section.

(b) Transactions deemed in compliance with applicable regulations

For the purpose of determining the applicability of this section, an alternative mortgage transaction shall be deemed to be made in accordance with the applicable regulation notwithstanding the housing creditor's failure to comply with the regulation, if—

(1) the transaction is in substantial compliance with the regulation; and

(2) within sixty days of discovering any error, the housing creditor corrects such error, including making appropriate adjustments, if any, to the account.

(c) Preemption of State constitutions, laws or regulations

An alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation.

APPENDIX Q

12 C.F.R. Section Sec. 560.2

Applicability of law.

(a) Occupation of field. Pursuant to sections 4(a) and 5(a) of the HOLA, 12 U.S.C. 1463(a), 1464(a), OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA. To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or Sec. 560.110 of this part. For purposes of this section, ``state law" includes any state statute, regulation, ruling, order or judicial decision.

(b) Illustrative examples. Except as provided in Sec. 560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:

(1) Licensing, registration, filings, or reports by creditors;

(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements;

(3) Loan-to-value ratios;

(4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;

(6) Escrow accounts, impound accounts, and similar accounts;

(7) Security property, including leaseholds;

(8) Access to and use of credit reports;

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Usury and interest rate ceilings to the extent provided in 12 U.S.C. 1735f-7a and part 590 of this chapter and 12 U.S.C. 1463(g) and Sec. 560.110 of this part; and

(13) Due-on-sale clauses to the extent provided in 12 U.S.C. 1701j-3 and part 591 of this chapter.

(c) State laws that are not preempted. State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

(1) Contract and commercial law;

(2) Real property law;

(3) Homestead laws specified in 12 U.S.C. 1462a(f);

(4) Tort law;

(5) Criminal law; and

(6) Any other law that OTS, upon review, finds:

(i) Furthers a vital state interest; and

(ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

APPENDIX R

12 C.F.R. Section 560.220 (September 26, 2002)

Alternative Mortgage Transaction Parity Act.

(a) Applicable housing creditors. A housing creditor that is not a commercial bank, a credit union, or a federal savings association, may make an alternative mortgage transaction as defined at 12 U.S.C. 3802(1), by following the regulations identified in paragraph (b) of this section, notwithstanding any state constitution, law, or regulation. See 12 U.S.C. 3803.

(b) Applicable regulations. OTS identifies Sec. Sec. 560.35 and 560.210 as appropriate and applicable for state housing creditors. All other OTS regulations are not identified, and are inappropriate and inapplicable for state housing creditors. State housing creditors engaged in credit sales should read the term "loan" as "credit sale" wherever applicable in applying these regulations.

APPENDIX S

12 C.F.R. Section 560.220 (January 1, 1999)

Alternative Mortgage Transaction Parity Act.

Pursuant to 12 U.S.C. 3803, housing creditors that are not commercial banks, credit unions, or Federal savings associations may make alternative mortgage transactions as defined by that section and further defined and described by applicable regulations identified in this section, notwithstanding any state constitution, law, or regulation. In accordance with section 807(b) of Public Law 97-320, 12 U.S.C. 3801 note, Secs. 560.33, 560.34, 560.35, and 560.210 of this part are identified as appropriate and applicable to the exercise of this authority and all regulations not so identified are deemed inappropriate and inapplicable. Housing creditors engaged in credit sales should read the term "loan" as "credit sale" wherever applicable.

APPENDIX T

12 C.F.R. Section 560.34

Prepayments.

Any prepayment on a real estate loan must be applied directly to reduce the principal balance on the loan unless the loan contract or the borrower specifies otherwise. Subject to the terms of the loan contract, a Federal savings association may impose a fee for any prepayment of a loan.

APPENDIX U

12 C.F.R. Section 590.3

Operation.

(a) The provisions of the constitution or law of any state expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any Federally-related loan:

(1) Made after March 31, 1980; and

(2) Secured by a first lien on:

(i) Residential real property;

(ii) Stock in a residential cooperative housing corporation when the loan is used to finance the acquisition of such stock; or

(iii) A residential manufactured home: Provided, That the loan so secured contains the consumer safeguards required by Sec. 590.4 of this part;

(b) The provisions of paragraph (a) of this section shall apply to loans made in any state on or before the date (after April 1, 1980 and prior to April 1, 1983) on which the state adopts a law or certifies that the voters of such state have voted in favor of any law, constitutional or otherwise, which states explicitly and by its terms that such state does not want the provisions of paragraph (a) of this section to apply with respect to loans made in such state, except that—

(1) The provisions of paragraph (a) of this section shall apply to any loan which is made after such date pursuant to a commitment therefore which was entered into during the period beginning on April 1, 1980, and ending on the date the state takes such action;

(2) The provisions of paragraph (a) of this section shall apply to any rollover of a loan which loan was made, or committed to be made, during the period beginning on April 1, 1980, and ending on the date the state takes such action, if the mortgage document or loan note provided that the interest rate to the original borrower could be changed through the use of such a rollover; and

(3) At any time after the date of adoption of these regulations, any state may adopt a provision of law placing limitations on discount points or such other charges on any loan described in this part.

(c) Nothing in this section preempts limitations in state laws on prepayment charges, attorneys' fees, late charges or other provisions designed to protect borrowers.

APPENDIX V

Cal. Civil Code Section 2948.5 (1985)

Interest on the principal obligation of a promissory note secured by a mortgage or deed of trust on real property improved with one-to-four residential dwelling units shall not commence to accrue prior to close of escrow if the loan proceeds are paid into escrow or, if there is no escrow, the date upon which the loan proceeds have been made available for withdrawal as a matter of right, as specified in subdivision (d) of Section 12413.1 of the Insurance Code.

APPENDIX W

Cal. Fin. Code Section 50204 (2001)

A licensee may not do any of the following . . .

(o) Require a borrower to pay interest on the mortgage loan for a period in excess of one day prior to recording of the mortgage or deed of trust. Notwithstanding the foregoing, if the borrower affirmatively requests, and the lender agrees, that the recording will occur on Monday, or a day immediately following a bank holiday, interest may commence to accrue on the business day immediately preceeding [sic] the day of recording, provided the following is disclosed to the borrower in writing: (1) the amount of additional per diem interest charged to accommodate recording on Monday or the day following a holiday, as the case may be, and (2) that it may be possible to avoid the additional per diem interest charge by recording the loan or deed of trust on a day immediately following a business day. This disclosure shall be provided to the borrower when the parties establish the recording date, and the borrower shall acknowledge the additional interest charge by signing the disclosure instrument.

No. 06-493

In The
Supreme Court of the United States

QUICKEN LOANS, INC.,

Petitioner,

v.

PRESTON DuFAUCHARD,

Respondent.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

The Alternative Mortgage Transaction Parity Act ("Parity Act")

Respondent disputes Petitioner's assertion that a conflict exists between the Ninth Circuit and Seventh Circuit concerning the preemptive effect of the Parity Act. There is no conflict or question requiring review or resolution by this Court regarding the Parity Act.

The Depository Institutions Deregulation and Monetary Control Act ("DIDMCA")

Respondent also disputes Petitioner's characterization of the holding of the Ninth Circuit opinion below. Therefore, as argued in further detail herein, Respondent believes there is no question requiring review regarding the DIDMCA.

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner below was Quicken Loans, Inc. ("Quicken Loans"). The Respondent below was Wayne Strumpfer, then Acting Commissioner of the California Department of Corporations. Preston DuFauchard is now the Commissioner of the California Department of Corporations ("Commissioner"), and the named Respondent to this Petition.

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RESPONSE TO PETITION FOR A WRIT OF *CERTIORARI*

Respondent prays that this Court deny the petition for a writ of *certiorari* sought by Quicken Loans, Inc.

STATEMENT OF THE CASE

The Commissioner of the Department of Corporations ("Commissioner") is the state official charged with enforcing the California Residential Mortgage Lending Act (Cal. Fin. Code § 50000 *et seq.*) ("CRMLA"), including Financial Code § 50204(o). The CRMLA is a consumer protection law, enacted to protect California consumers in the area of mortgage lending.

California Civil Code section 2948.5[1] and California Financial Code section 50204(o)[2] prohibited lenders licensed under the CRMLA from charging borrowers per diem interest for more than one day prior to the recording of the mortgage or deed of trust. Together they will be

[1] The version of Civil Code section 2948.5 in effect at the time of this dispute (prior to its most recent amendment) provided in pertinent part as follows:

> A borrower shall not be required to pay interest on a principal obligation under a promissory note secured by a mortgage or deed of trust on real property improved with between one to four residential dwelling units for a period in excess of one day prior to recording of the mortgage or deed of trust if the loan proceeds are paid into escrow.

[2] At the time of this dispute, California Financial Code section 50204(o) read in pertinent part as follows:

> A licensee may not . . . [r]equire a borrower to pay interest on the mortgage loan for a period in excess of one day prior to recording of the mortgage or deed of trust.

refe[illegible]d to frequently herein as the "Per Diem Statutes." The statutes have since been amended to prohibit lenders from charging per diem interest for more than one day prior to disbursement of the loan proceeds.

It is undisputed that Quicken Loans is a "nonfederally chartered" lender within the meaning of the Parity Act, and that it is required under the CRMLA to obtain a license from the Commissioner. In its role as regulator of California licensed mortgage lenders, the Department of Corporations began an examination of Quicken Loans in 2001. This resulted in a March 11, 2002 letter to Quicken Loans, noting violations of Civil Code section 2948.5 and Financial Code section 50204(o), the Per Diem Statutes, and demanding compliance. On January 28, 2003, the Department again wrote to Quicken Loans, reiterating its demand for compliance with the Per Diem Statutes.

On February 11, 2003, Quicken Loans filed its original Complaint in U.S. District Court (Eastern District of California), alleging federal preemption of the Per Diem Statutes by DIDMCA and the Parity Act. Quicken Loans subsequently filed a First Amended Complaint, adding a claim for a "taking" under the U.S. Constitution. The district court dismissed the "takings" claim for lack of ripeness. The Ninth Circuit affirmed that dismissal, and the "takings" claim is not a subject of the petition herein.

The district court granted summary judgment against the Commissioner on the DIDMCA preemption claim, and summary judgment against Quicken Loans on the Parity Act claim. Both sides appealed. The Ninth Circuit vacated the summary judgment against the Commissioner on the

DIDMCA claim, and affirmed the summary judgment against Quicken Loans on the Parity Act claim.

REASONS WHY THIS PETITION SHOULD NOT BE GRANTED

I. There is no conflict with the decisions of other United States courts of appeals on the scope of Parity Act Preemption.

Contrary to the assertions of Quicken Loans, there is no "split" between the Ninth Circuit and any other circuit on the scope of the Parity Act's preemption. Quicken Loans mischaracterizes the holding of *Ill. Ass'n of Mortgage Brokers v. Office of Banks and Real Estate*, 308 F.3d 762 (7th Cir. 2002). The issue on appeal in *Ill. Ass'n of Mortgage Brokers* was whether the Home Ownership and Equity Protection Act of 1994 (HOEPA) repealed the Parity Act. *Id.* at 763, 764.

In *Ill. Ass'n of Mortgage Brokers*, the State of Illinois issued regulations to augment HOEPA pertaining to balloon payments, prepayment penalties, and amortization schedules. *Id.* at 764. The Seventh Circuit Court of Appeals found that HOEPA did not repeal the Parity Act. *Id.* at 765, 766. Thus, the regulations issued by the State of Illinois were possibly preempted by the Parity Act to the extent that they blocked state lenders from extending credit on terms available under federal regulations. *Id.* at 768. However, the court did not fully address the issue of conflict preemption and remanded the case to the trial court to decide which of the state regulations, if any, infringed on the Parity Act and the regulations of the Office of Thrift Supervision ("OTS"). *Id.* at 768.

In contrast, in the instant case the Ninth Circuit has held that there was no actual conflict between California's Per Diem Statutes and the OTS regulation on adjustments to loan payments. It is not impossible to comply with both the Per Diem Statutes and the OTS regulation. (Opinion below, Appendix A, p. 8a) Therefore, there is no basis for conflict preemption.

Similarly, Quicken Loans misreads *National Home Equity Mortgage Association v. Face*, 239 F.3d 633 (4th Cir. 2001) to argue that there is a split in authority. The issue in *National Home* was whether a state housing creditor could require and enforce a prepayment fee in a mortgage agreement notwithstanding Virginia's law. *Id.* at 638.

The court found that 12 C.F.R. § 560.220, which specifically addresses prepayment fees, applies and thus the Parity Act preempted Virginia's conflicting law limiting prepayment fees. *National Home*, 239 F.3d at 638, 639. Hence, state housing creditors offering alternative mortgage transactions can use prepayment fee terms, *not* because federally chartered lenders can, but because regulation 12 C.F.R. § 560.220 expressly allows it.[3] *National Home* is a clear case of conflict between the state statute and the federal regulation, something the courts below have specifically held *not* to exist in the instant case.

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[3] In *Black v. Financial Freedom Senior Funding Corp.* 92 Cal.App.4th 917, 934 (2001), the court in analyzing *NHEMA* concurred that the prepayment fee regulation by Virginia was preempted because the fees were specifically identified in 12 C.F.R. § 560.220 and thus applicable to nonfederally chartered housing creditors.

In short, there is simply no conflict between the opinion below and that of any other United States court of appeal, and there is no reason to grant the review on that basis.

II. The decision below is not a departure from the accepted and usual course of judicial proceedings.

A. Claimed Misinterpretation of the Parity Act

Quicken Loans rests its argument on the faulty premise that the Parity Act is intended to create uniform parity between federally and nonfederally chartered lenders. That is simply not the case.

Quicken Loans misinterprets *Ill. Ass'n of Mortgage Brokers*, *supra*, 308 F.3d 762 for the proposition that state lenders should be free to make alternative mortgage transactions on the same terms as federal lenders. That is not the holding of the case and it is not the purpose of the Parity Act. That case specifically held that state regulations are preempted under the Parity Act "to the extent that they block state lenders from extending credit on terms open under federal regulations . . . " *Id.* at 768.

This raises the issue of what federal regulations are applicable to nonfederally chartered lenders. In the Parity Act, Congress directed the OTS, as the federal agency responsible for oversight of housing creditors and the application of the Parity Act to such entities, to "identify, describe, and publish those portions or provisions of their respective regulations that are *inappropriate for (and thus inapplicable to) or that need to be conformed for the use of*, the nonfederally chartered housing creditors. . . . " Section

807 of title VIII of Act of October 15, 1982, (Pub. L. No. 97 – 320; 96 Stat. 1545 (emphasis added) *codified at* 12 U.S.C. § 3801.

In response to this delegation, the OTS promulgated the four regulations that are intrinsic to the ability of housing creditors to offer alternative mortgage transactions.[4] 12 C.F.R. § 560.220; 67 Fed. Reg. 60542, 60545 (2002). The four regulations identified in 12 C.F.R. § 560.220[5] as applicable to nonfederally chartered housing creditors, such as Quicken Loans, are: Imposition of Late Charges (§560.33); Prepayments of Real Estate Loans (§560.34); Adjustments to Home Loans (§560.35); and, Disclosures for Variable Rate Transactions (§560.210). The OTS, addressing these four regulations identified in 12

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[4] At issue in this litigation are the regulations that were in effect at the time the examination was conducted, namely 12 C.F.R. §§ 560.33, 560.34, 560.35 and 560.210. Effective July 1, 2003, sections 560.33 and 560.34 are removed and a housing creditor must comply only with sections 560.35 and 560.210 to make alternative mortgage transactions. 67 Fed. Reg. 60542, 60543, 60544 (2002). In its comments to the regulatory amendments, the OTS reasoned that the repealed regulations were not necessary because they were not adopted to enable federal thrifts to engage in alternative mortgage financing, but for safe and sound fiscal practices. 67 Fed. Reg. 60542, 60544 (2002).

[5] 12 C.F.R. § 560.220 provides:

> Pursuant to 12 U.S.C. 3803, housing creditors that are not commercial banks, credit unions, or federal saving associations may make alternative mortgage transactions as defined by that section and further defined and described by applicable regulations identified in this section, notwithstanding any state constitution, law, or regulation. In accordance with section 807(b) of Public Law 97-320, 12 U.S.C. 3801 note, §§ 560.33, 560.34, 560.35, and 560.210 of this part are identified as appropriate and applicable to the exercise of this authority and all regulations not so identified are deemed inappropriate and inapplicable. . . .

C.F.R. section 560.220, stated "[h]ousing creditors must comply with these requirements to obtain the benefit of the [Parity Act's] preemption of state laws. All other OTS regulations are *inappropriate and inapplicable* to state housing creditors." 67 Fed. Reg. 60542, 60543 (2002) (emphasis added). 12 C.F.R. § 560.220 identifies only those four areas of regulation and states that any regulations "not so identified are . . . inappropriate and inapplicable." As none of these regulations address per diem interest, or when a lender may begin to charge the borrower, they cannot preempt California's laws. Therefore, when the Ninth Circuit held against Quicken Loans, there was no denial of any right to parity. It was a holding consistent with the Parity Act.

Because the OTS was identifying those regulations that are "intrinsic to the ability to offer alternative loans," it cannot be claimed by Quicken Loans that nonfederally chartered lenders may make variable interest home mortgage loans and 'other alternative mortgage transactions' on the *same terms* as federally-chartered lenders. Rather, a plain reading of the Parity Act demonstrates that it does not provide for such an interpretation. The OTS "has never identified its preemption rules as applicable to state housing creditors under AMTPA." 67 Fed. Reg. 60542, 60544 (2002). Where state laws are directed at regulating all mortgage transactions and are not directed at restricting alternative mortgage transactions, the OTS "is reluctant to encroach upon this state authority. . . . " *Id.* The view of OTS here is therefore actually consistent with *Ansley v. Ameriquest Mortg. Co.*, 340 F.3d 858 (9th Cir. 2003) and with *Black v. Fin. Freedom Senior Funding Corp.*, 92 Cal.App.4th 917, 112 Cal.Rptr.2d 445 (2001), upon which the opinion below partly relied for guidance.

In short, the opinion below declined to preempt California's statute precisely because the Per Diem Statutes do not affect a state chartered lender's ability to have the parity with federally chartered lenders that is intended by the Parity Act. On the contrary, the Per Diem Statutes are the type of state law that Congress and OTS expressly declined to preempt. Therefore, the opinion below in no way offends traditional notions of statutory interpretation, and there is no reason to grant the petition on this basis.

B. The Ninth Circuit did not disregard the plain language of DIDMCA.

First, it must be recognized that in its DIDMCA argument, Quicken Loans is not attacking the opinion below, but rather the opinion in *Wells Fargo N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005). For in the opinion below, the Ninth Circuit simply held that Quicken Loans had failed to distinguish *Wells Fargo* and the Per Diem Statutes were not preempted by DIDMCA. Although Quicken Loans filed an *amicus* brief in *Wells Fargo*, the Ninth Circuit opinion disagreed with the analysis. This petition is simply another bite at that apple, and presents nothing new. More to the point, there is no departure from the rules of statutory interpretation.

In *Wells Fargo, supra*, the Court emphasized that it was convinced by the First Circuit decision in *Grunbeck v. Dime Savings Bank of New York, FSB*, 74 F.3d 331 (1st Cir. 1996). That decision, and *Wells Fargo* as well, held that the DIDMCA is concerned with only the "rate" and "amount" of interest, not with other features of the interest calculation. In the instant case, that meant DIDMCA is

not concerned with laws regulating when interest can commence, such as the California Per Diem Statutes. Nowhere in the *Wells Fargo* opinion does the Ninth Circuit "deviate from the plain meaning" of the federal statute, as the petition claims. Rather, *Wells Fargo* holds that the Per Diem Statutes do not expressly limit the rate or amount of interest, and therefore are not preempted.

Ironically, the petitioner here argues, as it did below, that the Per Diem Statutes expressly limit to zero the amount of interest that can be charged during a particular time. The irony is that it is petitioners, not the court below, who are looking to the impact of a particular statute, not to its express terms. By their express terms, the Per Diem Statutes deal only with the date upon which interest may begin to be computed, and not at all with either the rate or amount of the interest. In this regard, *Wells Fargo* is wholly consistent with *Grunbeck* in looking at what the statute expressly says, regardless of its impact during a short period of the loan. Once again, there is no departure from accepted norms of statutory interpretation, no conflict with any other decisions of this Court or other courts of appeal, and therefore no reason why this petition should be granted.

III. The opinion below did not abandon the doctrine of administrative deference; it simply analyzed it in a manner adverse to Quicken Loans.

Once again, it must be noted that Quicken Loans is seeking to attack not the opinion below, and not even the *Wells Fargo* opinion; rather, this point about administrative deference tries to reach back to the 1996 *Grunbeck* decision, 74 F.3d 331. Regardless, Quicken Loans errs

when it claims that the Ninth Circuit decision below abandons administrative deference because it "does not agree with it." In the opinion below, the Ninth Circuit did not cite any part of *Grunbeck* criticizing any aspect of the Opinion Letter of the Federal Home Loan Bank Board ("FHLBB", now OTS) at issue. The footnote cited by petitioner from *Wells Fargo* reads as follows:

> For reasons cited by *Grunbeck*, Quicken's argument that we should defer to the interpretation of the federal Office of Thrift Supervision is deficient. *See Grunbeck*, 74 F.3d at 336 ("Where Congress has spoken directly to the issue, an interpretation rendered by the agency responsible for administering the statute is entitled to no special deference." (citing *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984)).

Wells Fargo, 419 F.3d at 969, n.27. Both *Wells Fargo* and *Grunbeck* make the point that the relevant section of the DIDMCA ("expressly limiting the rate or amount of interest") is clear and succinct, *i.e.*, that "Congress has spoken directly to the issue." The much cited and discussed notion of "*Chevron* deference" applies only in opposite situations, *i.e.*, when the statute is ambiguous. *Chevron*, 467 U.S. at 842-844.

Quicken Loans cites *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905 (1997), for the proposition that OTS' interpretation of its regulation should be controlling. However, *Auer* granted deference to an opinion in an *amicus curiae* brief of the Secretary of Labor precisely because "Congress has not directly spoken to the precise question at issue . . ." *Id.*, at 457, quoting from *Chevron*. The theory of *Chevron* is that Congress delegates to agencies the power to make

rules to fill gaps in statutes. But there is no gap in the DIDMCA on the relevant issue. In *Christensen v. Harris County*, 529 U.S. 576, 586-587, 120 S.Ct. 1655 (2000), this Court reaffirmed that interpretations "such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference."

Even assuming *arguendo* that the opinion of the FHLBB were entitled to some deference, it is not applicable or relevant to the issues in this case. Quicken's characterization notwithstanding, the Maryland statute analyzed by FHLBB's General Counsel simply prohibited lenders from "requir(ing) payment of any interest in advance except any points permitted under this subtitle." Md. Com. Law Code Ann. § 12-103(b)(i)(vi). This bears no resemblance, and has no analogy, to the California Per Diem Statutes, which simply require recordation before the charging of interest. Therefore, the Opinion Letter for which Quicken urges such deference is irrelevant to the statutes at issue in this case. What is relevant is that two different circuits (in *Wells Fargo* and in *Grunbeck*) have held the language of DIDMCA ("expressly limiting the rate or amount of interest. . . . ") to be clear and unambiguous, without the need to defer to agency interpretations or opinions. This precludes the application of *Chevron* deference under any circumstances, and there is no reason to grant review on this basis.

IV. Contrary to Quicken Loans' assertions, the petition presents no important issues complementary to issues pending before this Court.

Quicken Loans asserts that the issue of how much deference to give to the cited FHLBB Opinion Letter is somehow complementary to the issues raised by *Watters v. Wachovia Bank, N.A.*, 431 F.3d 556 (6th Cir. 2005), cert. granted, 126 S.Ct. 2900 (2006). In *Watters*, the Office of the Comptroller of the Currency ("OCC") promulgated various regulations, including one (12 C.F.R. § 7.4006) stating that state laws applying to national banks (i.e., non-state chartered banks) applied equally to national bank operating subsidiaries. This had the claimed effect of exempting operating subsidiaries from certain state regulatory systems, because their parent national banks were exempt.

The Sixth Circuit held that that the regulations were entitled to *Chevron* deference.[6] The crucial point, however, is that the OCC was held to have promulgated its regulations under express Congressional authority; furthermore, the OCC was held to be using that authority to define the "incidental powers" of national banks beyond those enumerated in the statute. Regardless of how *Watters* is ever resolved, the instant case does not raise a related or "complementary" issue. When applied to this case, the FHLBB Opinion Letter does not address a matter on

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[6] The issue was decided similarly against the state regulator, i.e., Respondent herein, in *Wells Fargo Bank v. Boutris*, 419 F.3d 949 (9th Cir. 2005), already often cited in the Petition and this response. However, the issue of preemption by the National Bank Act and the OCC's regulations was decided wholly separately from the DIDMCA preemption issue, on which Respondent actually prevailed.

which Congress has been silent, or on which there is ambiguity. Quite the contrary; here, both the opinion below, and the *Grunbeck* decision it follows, held the statute (DIDMCA) to be clear in confining its preemptive effect to state laws ***expressly*** limiting the rate or amount of interest, and both decisions found that the state laws did not do that. As we have previously pointed out, there is actually no circuit split on the Parity Act issue, either, so as to warrant review by this Court.

Essentially, Quicken Loans is simply repeating its argument about deference to the FHLBB, but this time seeking to attach it to an issue on which this Court has granted *certiorari*. In reality, the opinion below has no bearing on the issues in *Watters*, and there is no reason to grant review on this basis.

V. There has been no "evisceration" of federal preemption, because the federal statutes at issue do not assert complete preemption of an entire field.

Quicken Loans lastly takes up a clarion call against alleged "evisceration" of federal preemption and alleged "balkanization" of the mortgage loan market. Respondent urges that Petitioner's zeal is misplaced when it chooses to defend these two statutes on such grounds.

At the risk of repetition, the portion of the DIDMCA at issue here raises a single and narrow issue: whether the Per Diem Statutes "expressly limit the rate or amount of interest." 12 U.S.C. § 1735f-7a(a)(1). Even the OTS (successor to the FHLBB) does not assert that the DIDMCA completely preempts state laws. See, e.g., 12 C.F.R. § 590.3(c): "Nothing in this section preempts limitations in

state laws on prepayment charges, attorneys' fees, late charges or other provisions designed to protect borrowers." The limited purpose of DIDMCA was discussed at length in *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907 (3d Cir. 1989). The court provided the following analysis of historical context and intent:

> "DIDMCA was passed at a time when inflation and interest rates were soaring; in this context, state usury laws decreased the availability of home mortgage loans and hindered the ability of financial institutions to pay market rates of interest to depositors since usury laws limited them to lending at rates well below those that the market would have dictated. Thus, the Senate Report that accompanied the bill containing what became § 501 of DIDMCA found:
>
> That where state usury laws require mortgage rates below market levels of interest, mortgage funds in those states will not be readily available and those funds will flow to other states where market yields are readily available. This artificial disruption of funds availability not only is harmful to potential homebuyers in states with such usury laws, it also frustrates national housing policies and programs. . . .
>
> The committee believes that this limited modification in state usury laws will enhance the stability and viability of our Nation's financial system and is needed to facilitate a national housing policy and the functioning of a national secondary market in mortgage lending.
>
> In addition to the adverse effects of usury ceilings on credit availability, mortgage rate ceilings must be removed if savings and loan institutions, as directed by other provisions of [the Act], are to

> begin to pay market rates of interest on savings deposits. Without enhancing the ability of institutions to achieve market rates on both sides of their balance sheets, the stability and continued viability of our nation's financial system would not be assured. Thus, Federal preemption of State usury ceilings would not only promote national home financing objectives but would provide the resources with which savers could be paid more interest on their savings accounts."

Smith v. Fidelity Consumer Discount Co., 898 F.2d at 911 (All emphases added). It is clear, then, that the DIDMCA is *not* an example of Congress attempting to completely occupy a field, but rather addressing a specific problem in a limited manner. The Ninth Circuit opinion below simply applies one clear phrase of its language ("expressly limiting . . . ") in a manner consistent with other state and federal case authorities and consistent with the federal statutory scheme.

As to the Parity Act, the opinion below achieves the same limited result. The Parity Act does not purport to completely preempt state laws regarding non-federally chartered lenders (such as Quicken Loans). Even the OTS, to whom Quicken Loans elsewhere urges such deference, "has never identified its preemption rules as applicable to state housing creditors under AMTPA." 67 Fed. Reg. 60542, 60544 (2002). Where state laws are directed at regulating all mortgage transactions and are not directed at restricting alternative mortgage transactions, the OTS "is reluctant to encroach upon this state authority. . . . " *Id.* It is therefore simply incorrect for Quicken Loans to contend that the opinion below "eviscerates" federal

preemption, when in fact no such preemption is intended by the statutes or by the agency administering them.

CONCLUSION

The Petition does not establish any cogent reasons why this Court should grant review. There are no circuit splits and no departures from appropriate statutory interpretation. The opinion below properly applies the law regarding administrative deference, and there is no damage being done to the accepted boundaries of federal preemption. Respondent urges the Court to deny this petition.

Respectfully submitted,

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APPENDIX 1

67 FR 60542-01

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision (OTS)

12 CFR Parts 560, 590, and 591

Alternative Mortgage Transaction Parity Act; Preemption

DATE: Thursday, September 26, 2002

[60542]

ACTION: Final rule.

SUMMARY: The Alternative Mortgage Transaction Parity Act (AMTPA) authorizes state chartered housing creditors to make, purchase, and enforce alternative mortgage transactions without regard to any state constitution, law, or regulation. To rely on AMTPA, certain state chartered housing creditors must comply with regulations on alternative mortgage transactions issued by the Office of Thrift Supervision (OTS). In today's rulemaking, OTS revises its rules identifying the OTS regulations that apply under AMTPA. OTS will no longer identify its regulations on prepayments and late charges for state chartered housing creditors.

OTS is also revising its limits on the amount of late charges that may be assessed on loans secured by first liens on residential manufactured homes under part 590, which addresses the preemption of state usury laws. In addition, OTS is making a minor technical change to the definition of reverse mortgage in part 591, which addresses the preemption of state due-on-sale laws.

EFFECTIVE DATE: January 1, 2003.

FOR FURTHER INFORMATION CONTACT: Theresa Stark, Senior Project Manager, Compliance Policy, (202) 906-7054; Karen Osterloh, Special Counsel, Regulations and Legislation Division, (202) 906-6639, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Alternative Mortgage Transaction Parity Act Regulations (§ 560.220)

The Alternative Mortgage Transaction Parity Act (AMTPA)[1] permits state chartered housing creditors[2] to make, purchase, and enforce alternative mortgage transactions if the creditors comply with regulations governing such transactions issued by federal regulators. AMTPA applies to loans with any alternative payment features that vary from conventional fixed-rate, fixed-term mortgage loans, such as variable rates, balloon payments, or call features. It allows state chartered housing creditors to engage in alternative mortgage transactions notwithstanding "any State constitution, law, or regulation," provided the transactions are made in conformity with

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[1] 12 U.S.C. 3801 *et seq.*

[2] A "housing creditor" is a depository institution, a lender approved by the Secretary of Housing and Urban Development for participation in certain mortgage insurance programs, "any person who regularly makes loans, credit sales or advances secured by interests in properties referred to in [AMTPA]; or * * * any transferee of any of them." To qualify as a state housing creditor and take advantage of preemption, AMTPA specifically provides that the creditor must be "licensed under applicable State law and [remain or become] subject to the applicable regulatory requirements and enforcement mechanisms provided by State law." 12 U.S.C. 3802(2).

regulations issued by one of three federal regulators.[3] Housing creditors, other than state chartered [60543] commercial banks and state chartered credit unions, that wish to make an alternative mortgage transaction under the authority of AMTPA, must comply with OTS regulations. State chartered commercial banks and state chartered credit unions must comply with regulations of the Office of the Comptroller of the Currency (OCC) and the National Credit Union Administration (NCUA), respectively.[4]

AMTPA directed the Federal Home Loan Bank Board (Bank Board), OTS's predecessor agency, OCC, and NCUA to identify, describe, and publish those portions of their regulations that are inappropriate for, and thus inapplicable to, their respective state chartered housing creditors.[5] The identified regulations are enforced by each state housing creditor's applicable state regulator.

Currently, OTS's regulation at § 560.220 identifies the following regulations as appropriate for, and applicable to, state housing creditors:

- § 560.33. This reference permits state housing creditors to impose late charges for any delinquent periodic payment and sets out certain limitations on the assessment of such late charges.

- § 560.34. This reference permits state housing creditors to impose a prepayment penalty and indicates how prepayments must be applied.

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[3] 12 U.S.C. 3803(c).

[4] 12 U.S.C. 3803(a).

[5] Section 807(b) of Pub. L. 97-320 (1982).

- § 560.35. This section addresses adjustments to interest rate, adjustments to the payment and loan balance, and the use of indices.
- § 560.210. This reference requires state housing creditors to provide initial disclosures and adjustment notices for variable rate transactions.

Housing creditors must comply with these requirements to obtain the benefit of AMTPA's preemption of state laws. All other OTS regulations are inappropriate and inapplicable to state housing creditors.

On April 5, 2000, OTS published an advance notice of proposed rulemaking (ANPR) entitled "Responsible Alternative Mortgage Lending."[6] The ANPR sought public comment on various questions in connection with a review of mortgage lending regulations, including comments on possible amendments to § 560.220.

On April 25, 2002, OTS issued a notice of proposed rulemaking (NPRM).[7] OTS proposed to delete the late charge and prepayment rules (§§ 560.33 and 560.34) from the list of regulations that apply to state housing creditors under AMTPA. OTS proposed to continue to identify the other two rules (§§ 560.35 and 560.210) as appropriate and applicable for state housing creditors.

OTS received 298 comments on the proposed rule and 293 of these commenters addressed changes to AMTPA provisions. The commenters were equally divided between

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[6] 65 FR 17811 (Apr. 5, 2000).

[7] 67 FR 20468 (Apr. 25, 2002).

support and opposition for the rule. About three-quarters of the commenters filed one of five form letters.

A. OTS Authority Under AMTPA

1. Background

Congress enacted AMTPA in 1982 to stimulate credit in an unusually high interest rate environment by encouraging variable rate mortgages and other creative financing. In hearings before the Senate in 1981, mortgage bankers testified that statutes in 26 states barred state chartered mortgage bankers and lending institutions from originating alternative mortgage loans, or imposed significantly higher restrictions on such loans than applied to federally chartered lenders operating under federal regulations.

Congress incorporated this factual background at 12 U.S.C. 3801(a). Congress found that increasingly volatile and dynamic changes in interest rates had seriously impaired the ability of housing creditors to provide consumers with fixed-term, fixed-rate credit secured by interests in real property, and that alternative mortgage transactions were essential to an adequate supply of credit. AMTPA also noted that OCC, NCUA, and OTS had recognized the importance of alternative mortgage transactions and had adopted "regulations authorizing federally chartered depository institutions to engage in alternative mortgage financing." AMTPA indicated that:

> It is the purpose of this chapter to eliminate the discriminatory impact that those regulations have upon nonfederally chartered housing creditors and provide them with parity with federally chartered institutions by authorizing all housing

> creditors to make, purchase, and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by the Federal agencies. 12 U.S.C. 3801(b).

Section 3803(a) states that state housing creditors may comply with regulations governing alternative mortgage transactions issued by NCUA, OCC, or OTS. Section 807(b) of AMTPA directs the three federal regulators to identify, describe, and publish those portions or provisions of their respective regulations that are "inappropriate for (and thus inapplicable to)" nonfederally chartered housing creditors.

Apart from references to federal regulations governing alternative mortgage transactions and regulations authorizing federally chartered lenders to engage in alternative mortgage transactions, neither the statute nor the legislative history details how the three federal agencies are to exercise their authority under section 807(b). For example, AMTPA and the legislative history do not reference or provide examples of specific types of regulations that the agencies should identify for state housing creditors.

As a result of this inconclusive direction, OTS and the Bank Board have wrestled with the proper scope of the identification of regulations for state housing creditors under AMTPA. At times, the agency has taken a narrow view of AMTPA and its legislative history. For example, the Bank Board initially identified as appropriate and applicable only those regulations that "describe and define" alternative mortgage transactions and did not identify regulations intended for the general supervision of federal savings associations. As a result, the Bank Board declined to identify rules that applied to loans generally

(as distinguished from rules that bear directly on the unique features of alternative mortgage loans).[8]

In 1996, however, OTS reviewed its AMTPA authority and identified two general lending rules – the prepayment and late charge provisions at issue in this rulemaking.[9] The apparent rationale, contained in a contemporaneous legal opinion, but not in the rulemaking, was the conclusion that state housing creditors would be "disadvantaged vis-[agrave]-vis federal thrifts" if they were required to comply with state laws restricting prepayment penalties and late charges.[10] Even the contemporaneous legal opinion, however, conceded that the state laws on these subjects fell somewhere between laws clearly preempted by AMTPA (state laws barring variable rate mortgage loan transactions) and laws clearly not preempted (state laws governing liens and foreclosures).

NCUA and OCC regulations also reflect various interpretations of the scope of section 807(b) of AMTPA. NCUA has interpreted section 807(b) to permit the identification of all of its lending regulations as applicable to alternative mortgage transactions by state chartered credit unions. These mortgage regulations address such matters as the term of the loan; **[60544]** requirements governing security instruments, notes, and liens; due-on-sale provisions; and assumptions. NCUA rules specifically preempt state laws addressing certain areas. 12 CFR 701.21. OCC, on the other hand, has identified as

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[8] 47 FR 51732 (Nov. 17, 1982) and 48 FR 23032, 23053 (May 23, 1983).

[9] 61 FR 50951 (Sept. 30, 1996).

[10] OTS Op. Chief Counsel (Apr. 30, 1996).

applicable for state commercial banks a narrow band of rules. These rules: define adjustable rate mortgages (ARMs); state that ARMS may be made, sold, purchased, participated in, or otherwise dealt in without regard to any state law limitation on those activities; authorize certain indices; and specifically allow prepayment fees. 12 CFR part 34, subpart B.

As these various approaches illustrate, section 807(b) is susceptible to a number of interpretations. Each of the agencies has exercised broad discretion in its identification of appropriate regulations under AMTPA and has struck a different balance depending on its applicable statutory and regulatory scheme. Under the current rules, each of the three agencies has advanced a different interpretation of its responsibilities under section 807(b) of AMTPA.

2. OTS's Approach

In the NPRM, OTS reexamined its 1996 interpretation. OTS noted that the purpose of AMTPA was to enable all housing creditors to provide credit through alternative mortgages and to preempt state laws that would prevent that type of credit. OTS found that its regulations governing adjustments to the interest rate, adjustments to the payment and loan balance, the use of indices, initial disclosures, and adjustment notices were essential or intrinsic to the ability of state housing creditors to continue to provide alternative mortgage transactions. To provide parity with federal thrifts, OTS proposed to continue to identify §§ 560.35 and 560.210 for state housing creditors.

On the other hand, OTS tentatively noted, upon further reflection, that the prepayment and late fee

provisions were not essential or intrinsic to the ability to offer alternative mortgages. Rather, these regulations apply to real estate lending in general and are part of the broader regulatory scheme governing the lending operations of thrifts. OTS noted that one of the congressional findings underlying AMTPA was that the various federal regulators had adopted regulations authorizing federal institutions to offer alternative mortgages, and that the purpose of AMTPA was to eliminate the discriminatory impact of those regulations. OTS tentatively found that its regulations on prepayments and late fees were not adopted to enable federal thrifts to engage in alternative mortgage financing, but rather to permit federal thrifts to operate safely and soundly under a uniform federal scheme. *See* 12 CFR 560.2(a). Therefore, OTS tentatively concluded that these regulations did not offer a basis for claiming discriminatory treatment or were not needed to provide parity with federally chartered institutions. Accordingly, OTS tentatively concluded that there was no basis to distinguish prepayment and late charge provisions from other general lending rules and proposed to delete the two provisions from the list of identified rules for state housing creditors. As we explain in this statement of supplementary information, after reviewing the comments and further considering the issues, OTS adopts these findings and conclusions.

3. Comments on OTS's Approach

Several commenters argued that if AMTPA is to be given its proper effect, state housing creditors should be governed by the same regulations that address alternative mortgage transactions by federal savings associations. According to commenters, these rules include § 560.2(a),

which states OTS's intent to occupy the entire field of lending regulation for federal savings associations in preemption of state law, and § 560.2(b), which expressly preempts state laws that address such matters as private mortgage insurance requirements, loan-to-value ratios, terms of credit, loan-related fees (including late charges and prepayment penalties), access to credit reports, disclosures, and advertising laws.

OTS has never identified its preemption rules as applicable to state housing creditors under AMTPA. While commenters argued that the failure to apply these preemptive regulations would disadvantage state housing creditors vis-[agrave]-vis federal thrifts, OTS believes that this position would lead to an inappropriate result under its regulatory framework.

To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices, OTS has occupied the entire field of lending regulation for federal thrifts and has given federal savings associations the maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme. *See* 12 CFR 560.2(a). This complex uniform regulatory scheme benefits federal thrifts by preempting most state laws that otherwise would impose on federal savings associations different regulatory requirements from state-to-state. The system, however, also imposes various obligations on federal savings associations. For example, thrifts must comply with an array of regulatory limitations designed to ensure that their mortgage lending operations are conducted in a safe and sound manner. These limitations include appraisal requirements, real estate lending standards, underwriting guidelines, limits on loans to one borrower, and documentation

requirements. Thrifts are also subject to regular examination, supervision, and enforcement of their lending activities.

OTS does not believe that it may impose these concomitant obligations on state housing creditors in this rulemaking given the instructions in the legislative history that it was not Congress' intent to place state housing creditors under the supervision of the federal agencies.[11] However, preemption under § 560.2, without the application of the related duties, would lead to an unreasonable regulatory result, *i.e.*, the perverse situation where state housing creditors could engage in mortgage lending – an area that is traditionally highly regulated – unfettered by most state or federal restrictions, thereby creating a regulatory vacuum. Accordingly, OTS declines to identify its preemption rules as applicable to state housing creditors.

Other general lending rules, such as §§ 560.33 and 560.34, are also a part of the broader regulatory scheme governing OTS supervision of the lending operations of federal thrifts. The states have, to a greater or lesser degree, adopted laws and regulations similarly designed to supervise the lending operations of state housing creditors. States that restrict prepayment penalties and late charges usually apply those restrictions to all real estate loans, not

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[11] Sen. Rep. 97-463, at 55 (1982). This interpretation is also contrary to other expressions of congressional intent, which left room for state action by specifically reserving specific areas to the states. 12 U.S.C. 3802(2), for example, indicates that state housing creditors must comply with applicable state licensing requirements and must remain or become subject to the applicable regulatory requirements and enforcement mechanisms provided by state law.

just to alternative mortgage transactions. As a result, the state laws in these areas are not directed at restricting alternative mortgage transactions, but in regulating mortgage transactions in general. OTS is reluctant to encroach upon this state authority, given the cited statutory direction and the statements of legislative intent.

For these reasons, OTS declines to identify its rules preempting state lending regulations or any other rule **[60545]** that applies to real estate lending in general. Rather, OTS will identify only those regulations that OTS deems to be intrinsic to the ability to offer alternative loans.[12]

A number of commenters alleged that this interpretation of AMTPA would subject state housing creditors to state laws on prepayments and late charges while federal thrifts would remain subject to more permissive OTS regulations in these areas. As a result, these commenters argued that the proposed rule is inconsistent with the twin purposes of AMTPA – the elimination of discriminatory impact that federal regulations have on state housing creditors and the promotion of parity for state housing creditors. Specifically, commenters speculated that the proposed rule would discriminate against state housing

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[12] One commenter warned that this focus could undermine the broad preemption available for federal thrifts, *i.e.*, that state law may be preempted for federal thrifts only when preemption is "intrinsic" to the effectuation of a federal policy or goal. Other commenters sought assurance that the final rule would not erode or impair the scope of preemption available to, or the lending powers of, federal savings associations under the Home Owners' Loan Act (HOLA). This rule addresses OTS authority to identify rules for state housing creditors under AMTPA and has no impact on preemption available to, or the lending powers of, federal thrifts under the HOLA. The preemption principles under the HOLA are well settled. *See e.g.*, 12 CFR 545.2, 557.11, and 560.2; and OTS Op. Chief Counsel (Nov. 22, 1999).

creditors vis-[agrave]-vis federal savings associations in the following ways:

- Limit the range of products offered by state housing creditors. Some state housing creditors would no longer be able to offer lower rates to consumers who agree to take a loan with a prepayment penalty. In addition, restrictions on late charges would deny lenders flexibility in loan pricing and prohibit lenders from placing the cost of late payments on delinquent borrowers.

- Increase compliance costs, risk of document error, and litigation risk. Rather than complying with uniform OTS rules, creditors with multi-state operations would have to comply with inconsistent state and local laws.

- Reduce the ability to minimize prepayment risk. Prepayment penalties protect state housing creditors (and secondary market purchasers) from extreme changes in their portfolios.

- Reduce the value of their loans in the secondary market. Investors will be less able to protect against prepayment risk, and will incur additional due diligence costs (and risks) to review pools against widely varying state law. These costs will be passed on to state housing creditors. The secondary market also may have to create separate pools for federally chartered lenders and state chartered lenders to accommodate these differences.

Commenters also speculated that some lenders may choose not to offer alternative mortgage transactions in jurisdictions with restrictive laws, may cease all lending operations within those jurisdictions, or exit the industry entirely. This reduced competition, they argue, would reduce the availability of affordable credit to consumers contrary to the goals of AMTPA.

Contrary to commenters' speculation, historical evidence indicates that the final rule should not have a significant detrimental effect on state housing creditors' ability to compete against federal thrifts in the alternative mortgage market. State housing creditors functioned for 14 years (1982-1996) without applying OTS regulations on late charges and prepayments. While various prepayment regulations were applicable during this period, federal thrifts were relatively free to impose prepayment penalties since 1983.[13] Additionally, the regulations on late charges have not changed substantially during this period, other than to eliminate limitations on the amount of the late

[13] Until May 23, 1983, federal savings associations were permitted to impose prepayment penalties under limited circumstances. *See* 12 CFR 545.8-5(b) (1983) summarized below at note 19. On May 23, 1983, the Bank Board changed this rule to permit a federal savings association to impose prepayment penalties as provided in the loan contract. Penalties on loans secured by owner-occupied homes, however, were prohibited for a 90-day period following the issuance of a notice of adjustment of interest rate, payment balance, or term to maturity. 12 CFR 545.34(c) (1984). In 1993, OTS removed even these limited restrictions and allowed federal thrifts to impose prepayment penalties at any time and in any amount authorized in the loan contract for both adjustable rate and fixed rate loans. 58 FR 4308 (Jan. 14, 1993). This rule is now codified at 12 CFR 560.34 (2002).

charge.[14] Accordingly, OTS has concluded that these provisions are not essential for parity.

OTS also notes that state housing creditors were vigorous competitors in mortgage lending throughout this time period. While relative market share in the alternative mortgage market is not available, OTS does have information regarding the relative participation in the one- to four-family mortgage market. In 1982, commercial banks and thrifts dominated this market by originating approximately 66.0 percent of one- to four-family mortgages. Mortgage companies' market share was significantly smaller at 28.9 percent of the market. By 1996, when OTS changed its AMTPA rules, these positions had reversed with mortgage companies originating 56.8 percent and commercial banks and thrifts originating 42.5 percent of all one- to four-family mortgages.[15]

Moreover, it is not clear that Congress viewed prepayment penalties and late charges as essential to parity. Neither AMTPA nor its legislative history provides any useful guidance concerning this issue. However, if Congress had viewed these provisions as essential to parity, it is unlikely that Congress would have adopted the statutory scheme found in AMTPA. As noted above, AMTPA does not place all state housing creditors within the jurisdiction of one federal regulator, but assigns state housing creditors to three federal agencies in a way that

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[14] *Compare* 12 CFR 545.8-3(e) (1983) with 12 CFR 560.33 (2002).

[15] This information was obtained on the Mortgage Bankers' Association's Web site, which indicates that its source was a HUD Survey of Mortgage Lending Activity discontinued in 1998. OTS notes that at least one commenter asserts that state housing creditors now originate approximately 80 percent of all mortgages.

"recogniz[es] traditional industry lines."[16] When AMTPA was enacted, however, NCUA, OCC, and the Bank Board had different requirements regarding prepayment penalties. Congress banned federal credit unions from imposing prepayment penalties, which suggests that, at least for credit unions, Congress recognized that prepayment penalties were not essential to the ability to make, purchase, or enforce alternative mortgage transactions.[17] OCC regulations, on the other hand, permitted national banks to impose prepayment penalties on ARMs until 30 days prior to the first scheduled interest rate adjustment date.[18] Bank Board regulations permitted federal savings associations to impose prepayment penalties on alternative mortgage transactions under other limited circumstances.[19] If Congress had **[60546]** viewed the regulation of prepayment penalties as essential to parity, it is unlikely that Congress would have imposed a regulatory scheme that, at the time of enactment, ensured different treatment among the various state creditors.

* * *

APPENDIX 2

Md. COMMERCIAL LAW Code Ann. § 12-103 (1986)

§ 12-103. Other permitted rates of interest; licensing requirements

(b) Loans secured by residential real property; licensing requirements. –

(1) A lender may charge interest at any effective rate of simple interest on the unpaid principal balance of a loan if: . . .

(vi) The lender does not require payment of any interest in advance except any points permitted under this subtitle.

APPENDIX 3

12 CFR 7.4006

§ 7.4006 Applicability of State law to national bank operating subsidiaries.

Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.

(3)

No. 06-493

FILED

NOV 28 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

QUICKEN LOANS INC.,

Petitioner,

v.

PRESTON DUFAUCHARD,

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

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I. The Ninth Circuit has split with the Seventh Circuit on the scope of the Parity Act's express preemption.

A. The Ninth Circuit's three-part test for Parity Act preemption conflicts with the holding of the Seventh Circuit.

The Seventh Circuit "h[e]ld that the new state regulations [at issue there] are preempted under § 3803(c) to the extent that they block state lenders from extending credit on terms open under federal regulations, when the lenders actually comply with the federal regulations." Ill. Ass'n of Mortg. Brokers v. Office of Banks and Real Estate, 308 F.3d 762, 768 (7th Cir. 2002) ("IAMB"). The Commissioner does not (and cannot) claim that the Ninth Circuit's three-part test, which compels a disparate outcome, is consistent with the Seventh Circuit's.

B. The split is over the scope of express preemption, not conflict preemption.

The issue that divides the circuits is the scope of the Parity Act's express preemption, not conflict preemption. That is, the issue is whether Quicken Loans *must* comply with the Per Diem Statutes when making alternative mortgage transactions even though federally chartered lenders need not. The issue is *not*, as the Commissioner implies (Brief in Opposition at 3), the scope of conflict preemption. Whether Quicken Loans is able to comply with both the Per Diem Statutes and federal regulations of alternative mortgage transactions is irrelevant to the question of whether the Per Diem Statutes are preempted for the purpose of creating parity, because federally chartered lenders are indisputably not subject to the same state regulations.

Contrary to the Ninth Circuit's holding, Quicken Loans need not comply with the Per Diem Statutes when

making alternative mortgage transactions, because the Parity Act explicitly preempts the statutes. Otherwise there is disparity, in that state-chartered lenders are at a disadvantage compared to federally chartered lenders. The Seventh Circuit's and Fourth Circuit's proper interpretation of the Parity Act creates parity; the Ninth's creates disparity. The Ninth Circuit's decision not only disregards the text of the law, but defeats the statutory purpose, which is to eliminate the commercial advantage that federally chartered lenders used to enjoy over non-federally chartered lenders. The Commissioner's Brief fails to address this.

This Court should grant *certiorari* to address the conflict among the circuits on the scope of the Parity Act's express preemption.

II. Which regulations that OTS deems appropriate and applicable to state chartered lenders does not determine whether the Parity Act preempts the Per Diem Statutes.

The Commissioner argues that the Parity Act does not preempt the Per Diem Statutes as applied to Quicken Loans' alternative mortgage transactions because none of the four regulations that OTS identified as appropriate and applicable to state housing creditors address per diem interest. (Brief in Opposition at 7). However, what federal regulations OTS deems appropriate and applicable to nonfederally chartered lenders who want to enjoy the benefit of the statute is only half the picture and is not even pertinent to the issue in this case. The pertinent half of the picture, which the Commissioner does not address, is what *state* regulations are *not* applicable to alternative mortgage transactions made by federally chartered lenders. Whatever those state regulations are, they are preempted as to state-chartered lenders, because they do not equally apply to federally chartered lenders.

It is undisputed that the Per Diem Statutes do not apply to alternative mortgage transactions made by federally chartered lenders. Further, the Parity Act provides that "[a]n alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation." 12 U.S.C. Section 3803(c). Given these two facts, neither the Ninth Circuit nor the Commissioner has adequately explained why the Parity Act does not preempt the Per Diem Statutes as applied to Quicken Loans' alternative mortgage transactions.

III. The Ninth Circuit erred in refusing to defer to the OTS' opinion letter because the Maryland statute is essentially identical to the Per Diem Statutes.

The Ninth Circuit should have deferred to the OTS' interpretation of DIDMCA as stated in OTS' opinion letter regarding DIDMCA's preemption of Md. Comm. Law Section 12-103. There is no meaningful difference between the Maryland statute's prohibiting interest "in advance" of a certain event and the Per Diem Statutes' prohibiting interest "before" a certain event. Each means "prior to" or "before the occurrence of" some event. Therefore, the Ninth Circuit should have deferred to OTS' opinion.

The Commissioner's insistence that the Per Diem Statutes address only *when* interest may be charged, but not *what amount or rate* of interest may be charged, ignores the fact that there is never a "when" without a "what." The issue is how much interest may be charged at a particular point in time. The answer under the Per Diem Statutes is: for a varying and unknowable period—until the county recorder stamps the underlying mortgage—no amount of interest may be charged. This results in an interest rate of zero percent for the period and reduces the loan's overall interest rate.

This Court should grant *certiorari* to correct the Ninth Circuit's failure to defer to administrative

interpretations which that Court finds "unpersuasive" and to which it therefore declines to defer. The Ninth Circuit has erroneously conflated "deference" with "agreement."

CONCLUSION

The Ninth Circuit's erroneous interpretations of the Parity Act and DIDMCA will lead to further erosion of the preemption of state regulation of mortgage financing, contrary to Congress' explicitly-stated intent. This Court should act now to correct the Ninth Circuit's incursion upon Congress' power to regulate this important national industry. For the foregoing reasons, the Petition should be granted, and the decision below summarily reversed, or the case should be set for plenary briefing and argument on the questions presented.

Respectfully submitted,

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